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HARVARD LAW LIBRARY







REPORTS

OF

CASES

ARGUED AND DETERMINED IN THE

Supreme Court of Ohio

**HARVARD LAW LIBRARY**  
**IN BANK**

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VOLUME XI.

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# CASES

ARGUED AND DETERMINED IN THE

## Supreme Court of Ohio,

IN BANK,

DECEMBER TERM, 1841.

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PRESENT:

EBENEZER LANE, CHIEF JUSTICE.

REUBEN WOOD,  
PETER HITCHCOCK,  
FREDERICK GRIMKE, } JUSTICES.

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THE STATE OF OHIO v. THE GRANVILLE ALEXANDRIAN SOCIETY.

A grant of power, in an act of incorporation, "to hold any estate, real or personal, and the same to sell, grant, or dispose of, or bind by mortgage, or in such other manner as they shall deem most proper, for the best interest of the corporation," does not confer upon such corporation banking privileges.

Under the clause, in an act of incorporation, that the action of the corporation shall be "subject to such rules and regulations as the legislature, from time to time, may think proper to make," the general assembly may restrict such company from exercising the franchise of banking.

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 State of Ohio v. Granville Alexandrian Society.
 

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THIS is an information in the nature of a *quo warranto*, to ascertain by what authority the defendants exercise banking powers.

The information was filed in August, 1840, and charges, "that the Granville Alexandrian Society, for twelve months previous to 2] filing the information, and more, have and still do \*use, without any warrant, charter, or grant, the following liberties, privileges and franchises, not conferred upon it by law, to wit: that of becoming the proprietors of a bank or fund, for the purpose of issuing notes, receiving deposits, making discounts, and transacting other business, which incorporated banks may and do transact, by virtue of their respective acts of incorporation, and also that of actually issuing notes, receiving deposits, making discounts, and carrying on operations and other moneyed transactions, which are usually performed by incorporated banks, and which they have a right to do; of all which liberties, privileges, and franchises aforesaid, the said Granville Alexandrian Society, during all the time aforesaid, usurped, and still do usurp, upon the State of Ohio, to its great damage and prejudice; and so the said prosecuting attorney of the said State of Ohio avers, that the said Granville Alexandrian Society during all the time aforesaid, at Licking county aforesaid, hath and still does exercise a franchise and privilege not conferred upon it by law, against the peace and dignity of the State of Ohio, and contrary to the forms of the statute," etc.

To this information the defendant has filed several pleas:

1. The first plea sets forth that the defendants were, on January 26, 1807, created, by the legislature of Ohio, a body corporate and politic, with perpetual succession, by the name and title of "*The Granville Alexandrian Society*," capable, in their corporate capacity, of suing and being sued, etc.; to have a common seal, etc.; and power to ordain, establish, and put in execution such by-laws, ordinances, and regulations as they should deem most proper for the good government of the corporation; provided such by-laws, ordinances, and regulations are not incompatible with the constitution and laws of this state. The plea then sets out the second section of the act of incorporation, and claims to exercise banking privileges, by virtue of said charter.

To the first plea there is a demurrer, assigning for cause: That the act of the general assembly, passed January 26, 1807, entitled 3] "an act for incorporating a library society in \*the town of



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State of Ohio v. Granville Alexandrian Society.

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Granville, in the county of Fairfield," confers no banking privileges on said society, as is falsely claimed.

2. The second plea sets out that the society, under their act of incorporation, commenced banking on August 1, 1815, and continued to issue notes, receive deposits, etc., for a period exceeding twenty successive years prior to March 17, 1838.

To this plea there is a replication, a rejoinder to the replication, and issue joined to the country.

3. The third plea, after setting forth the incorporation of the "Granville Alexandrian Society," states, "That defendants, in virtue of said act of incorporation, and acting thereunder, heretofore, to wit, on August 1, 1815, at the town of Granville aforesaid, established a bank, in the name and by the authority of the corporation, and became the proprietors of a fund for the purpose of issuing notes, receiving deposits, and making discounts, and transacting all other banking business, and did then and there, in their corporate name and authority, issue notes, receive deposits and make discounts, and use and transact all other banking business; and that from the 1st day of August aforesaid hitherto, and for more than twenty years successively next preceding March 17, 1838, have, from time to time, issued notes, received deposits and made discounts, and transacted other banking business; and, during all said time have, without intermission, kept up by election and swearing into office of their directors and other officers, their organization as a bank; and upon all dividends by them declared in their banking business have paid the lawful tax to the State of Ohio, as a banking corporation, to wit, at Granville aforesaid," etc.

To this plea there is a demurrer, assigning for causes:

1. That the election and swearing in officers "during a period of twenty years," etc., is not such a *user* of a franchise as confers the right.

2. The payment of a tax on dividends confers no privileges on the society.

\*3. Having "from time to time," during a period of twenty [4 years, issued notes, etc., is not such a *user* as confers the right to bank.

4. Said plea is double in this, that it assigns three distinct causes of defense.

5. Said plea is otherwise defective, etc.

4. The fourth plea refers to the charter; states the commence-

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State of Ohio v. Granville Alexandrian Society.

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ment of banking, as in the third plea, and avers that after said commencement and before the commencement of this prosecution, to wit, on March 18, 1839, the legislature did recognize and fully acknowledge the right of defendants to bank.

To this plea there is a general demurrer.

5. The fifth plea sets out the charter, etc.; states the commencement of banking, as before, and specifies the recognition by the legislature to be by the appropriation of the sum of \$156.20 (which have been drawn for by the auditor of the state, and paid by the bank as a tax upon a dividend), to the common school fund, in the general appropriation, and passed March 18, 1839, "together with other money in said act named."

To this plea there is a special demurrer, and the causes of demurrer are:

1. That the draft of the auditor of state for tax on dividends is is not a recognition of the assumed power of the society.
2. Payment of said tax to the treasurer is not a recognition.
3. The appropriation by the legislature, in the act referred to, does not amount to a legislative recognition.

PARKER, Prosecuting Attorney, for the state:

In support of the demurrer to the first plea, it is denied that the intention of the legislature, in incorporating the Granville Alexandrian Society, was to confer banking privileges; neither does the 5] charter confer such privileges. This will be apparent \*if the ordinary rules for the construction of statutes are adhered to. 6 Bac. Ab. 384, 391; 15 Johns. 380, 383, 384; 4 Term, 793; 1 Atk. 174.

Corporations are artificial beings, existing only in contemplation of law, and possessing only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its existence. 14 Pet. 129; 2 Kent's Com. 298, 240; 2 Cranch, 127; 4 Wheat. 636; 4 Pet. 152; 15 Johns. 358, 384; 3 Pet. 232; 8 Ohio, 257, 287; 2 Kent's Com. 240.

In support of the demurrer to the third plea, it is contended that the Granville Alexandrian Society can not avail itself of the limitation in the act "relating to information in the nature of a *quo warranto*, and regulating the mode of proceeding therein," for the following reasons:

1. The application for leave to file an information, by the prosecuting attorney of Licking county, at the September term of the

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 State of Ohio v. Granville Alexandrian Society.
 

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Supreme Court of said county, in 1839, was a commencement of proceedings within the time prescribed by the act.

2. The passage of the resolution by the general assembly on which this information is filed, operates as an extension of the time within which this information may be filed, so far as this corporation is concerned.

3. The use of a privilege *occasionally*, or "*from time to time*," during a period of twenty years, is not such a user as can give a prescriptive right to the franchise, or bar a prosecution by order of the legislature. 4 Burrows, 2120; 3 Cruise's Dig. 310, 312. The defendants must show a continued and uninterrupted use and exercise of the franchise of banking, in order to claim it under the limitation of the law, and not an occasional and "*from time to time*" use.

The fourth plea is bad for generality. It specifies no act of the legislature upon which it predicates the claim of recognition.

The matters claimed as a legislative recognition, in the fifth plea, are not sufficient. Such recognition should be direct \*and positive. 2 New Hamp. 121; 10 Mass. 155; 3 Burrows, [6 1870; 3 Term, 232; 2 Johns. Ch. 320; 2 Mass. 133; 9 Ib. 352; 4 Pet. 502.

EWING & STANBERRY, for defendants:

The information in this case is defective. The provisions of *quo warranto* law extend as well to natural persons as to corporations; and as this information is against the Granville Alexandrian Society, it should have been stated that this is a body corporate.

Again, the information is defective, because it is not averred that the principal office, or place of business of the corporation, is in the county of Licking, which is the venue of the action. The proceedings under the *quo warranto* act, whether against individuals or corporations, are local.

If the information is held to be sufficient, then it will be necessary to look into the further pleadings.

The question presented under the first plea is, simply, whether the defendants can found the right of banking upon their charter. Section 2 provides, "That the corporation be and hereby is made capable in law to hold any estate, real or personal, and the same to sell, grant, or dispose of, or bind by mortgage, or in such other manner as they shall deem most proper for the best interests of

*State of Ohio v. Granville Alexandrian Society.*

the corporation, provided that the express purpose of any gift or grant be answered.'

In considering the question of powers granted by this charter, in reference to what is called the banking franchise, it must be considered as of the time when the charter was granted.

This charter was granted on January 26, 1807. At that time the business of banking was not a franchise. Every person capable of contracting might become a banker. So, too, every corporation made capable of contracting, and not limited in the exercise of this power to any particular form or purpose, might do the same. It has never been held, either in England or the United States, that the business of banking was a franchise of <sup>the</sup> government, necessary to be granted to the subject \*before it could be lawfully exercised. 2 Johns. Ch. 377. All the legislation in both countries is restrictive of the pre-existing right to contract in that form.

At the time of granting this charter, there was no restraining law of the kind in Ohio. The first law of this kind was enacted in 1815. But that law can not be so construed as to restrict the rights of this corporation. Those rights, having been vested in it by the act of its creation, could not be taken away by subsequent legislation.

This corporation was created, with unlimited power to contract, with a power equally unlimited of acquiring property, real or personal, and of disposing of such property *in such manner as it shall* deem most proper for its best interests. Under the power thus granted, it might engage in the business of banking. To sustain these positions, the case of this Corporation *v.* John Van Buskirk, decided by the Supreme Court of Licking county, in the year 1817, is referred to, and also the written opinion of Chancellor Kent; also the following cases: Taylor *v.* Miami Exporting Company, 6 Ohio, 176, and The People of New York *v.* The Manhattan Company, 9 Wend. 351.

The facts set forth in the third plea are sufficient to operate as a bar to this information, and those facts are well pleaded.

It is not double. The facts stated all conduce to one point, and to establish one proposition, the *user* of banking powers. Stephen's Pl. 262; 3 Chit. Pl. 1110; 4 East, 337; 6 Cowen, 216.

Reference was made, also, by the counsel to several acts of the

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State of Ohio v. Granville Alexandrian Society.

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legislature, and of the officers of the government, recognizing the Granville Alexandrian Society as a banking institution.

PARKER, Prosecuting Attorney, in reply, resisted the several positions assumed by defendants' counsel, and, at great length, argued to sustain the propositions by himself advanced in his opening argument. He cited the following authorities: 15 Johns. 384; 8 Cowen, 709; 1 Chit. 310, 311; 14 \*Pet. 129; 2 Kent's [8 Com. 239, 240; 8 Ohio, 286; 9 Wend. 351, 383; 6 Cowen, 316.

Judge HITCHCOCK delivered the opinion of the court:

This case has been very fully and ably argued by the counsel, as well for the state as for the defendants. It is a case of importance, and presents several questions requiring the grave consideration of the court. These questions have been fully considered, and will now be noted, so far as is necessary for the disposition of the case.

Several objections are made to the information, the first of which is, that it is filed against the defendants by the name of the Granville Alexandrian Society, without averring that said society is a corporate body.

The law under which this information is filed, authorizes proceedings of this kind against natural persons and against corporations.

Against natural persons:

"1. When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office in any corporation, created by the authority of this state.

"2. When any public officer, civil or military, shall have done or suffered any act, which, by the provisions of this act, shall work a forfeiture of his office.

"3. When any association of persons shall act as a corporation, within this state, without being legally incorporated."

Against any corporate body, when any such corporation shall have:

"1. Offended against any of the provisions of the acts creating, altering, amending, or renewing such corporation.

"2. Whenever it shall have forfeited its privileges and franchises by non-user.

"3. Whenever it shall have done or committed any acts which

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 State of Ohio v. Granville Alexandrian Society.
 

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amount to a surrender of its corporate rights, privileges, and franchises.

9] \*4. Whenever it shall have misused any franchise or privilege conferred, or exercise any franchise or privilege not conferred upon it by law." Swan's Stat. 770, 771.

The complaint in this case being, in fact, against a corporate body, for exercising a franchise not conferred upon it by law, it would have seemed to be more consistent with correct pleadings to have averred that the Granville Alexandrian Society was a body corporate, in law. There is not, perhaps, the same necessity of so doing in this state, where the private as well as the public acts of the legislature are printed in the statute book, and sent forth to the people, and where the court takes notice of them without pleading, as there would be in those states where a different course of practice prevails. But still, had there been no precedent to the contrary, we might have been inclined to the opinion, that, for this omission, this information was defective. But this information is framed after the precedent in the case of the People of New York v. Utica Insurance Company, 15 Johns. 384. It is like the information in the case of the State of Ohio v. Commercial Bank of Cincinnati, decided at the present term, and which was held to be sufficient.

Another objection made to the information is, that, although the venue, in the margin of the information, is laid in Licking county, yet it is nowhere stated that the principal office, or place of business, of the defendants, was in that county.

We all concur in the opinion that it should appear that the violation of the law complained of must have taken place in the county where the information is filed, and that it is equally necessary that it should so appear upon the face of the information, as it would be that it should appear in an indictment, that the offense complained of had been committed in the county where the indictment is found. The jurisdiction of this court, upon *quo warranto*, is confined to the county where the defendants have their office, or place of business. It is so expressly declared with respect to natural persons, and the same reason applies with respect to corporations. As to the question, whether this place of business is sufficiently alleged in the information, we do not entirely concur. The information, after stating (without any venue) that the society had used the franchises of becoming pro-

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State of Ohio v. Granville Alexandrian Society.

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priotor of a bank, and of issuing notes, etc., concludes as follows: "And so the said prosecuting attorney, for the said State of Ohio, avers that the said Granville Alexandrian Society, during all of the time aforesaid, at *Licking county aforesaid*, hath, and still doth exercise, a franchise and privilege not conferred upon it by law, contrary to the form of the statute," etc. Some of the members of the court believe that this is sufficient, and that, although the venue is not technically, it is substantially, laid. And, as this is rather a technical objection, we should be unwilling to dispose of the case, upon this point, without further consideration.

Holding, for present purposes, that the information is sufficient, we will proceed to the examination of the further pleadings.

The defense relied upon in the first plea is, that by the act of incorporation, banking powers were conferred upon the Granville Alexandrian Society. If such be a fact, there is an end to the case.

This act of incorporation was passed on January 26, 1807.

It must be admitted, that the purposes for which this act was passed, do not appear in the act itself. It is very short, and expressed in general terms. But the title is, "an act for incorporating a library society in the town of Granville, in the county of Fairfield." 5 Ohio Stat. 72. True, the title to an act does not constitute any part of the act, but it may be referred to, in order to explain what is doubtful in the act itself. And well may it be referred to in this case, where, without the title, it would be impossible to conjecture what object the legislature could have had in view. By reference to the title, we find the object to have been to incorporate a library association; and, in giving a construction to the act, this must be borne in mind. The powers granted were intended to be such as were necessary to effect this object. It is not \*reasonable to suppose that it was intended to grant any [11 other. If, however, others have been granted, it is not in the power of this court to restrain them, although it is in the power of the legislature to do it, for reasons which will be hereafter stated.

In section 1 of this act, it is enacted that certain individuals therein named, together with such others as shall be hereafter associated with them, shall be a body corporate, by the name of the "Granville Alexandrian Society," with the usual powers of contracting and being contracted with, of suing and being sued, of making by-laws, ordinances, etc.; "provided, said by-laws, ordi-

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 State of Ohio v. Granville Alexandrian Society.
 

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nances, and regulations are not incompatible with the constitution and laws of the state ; *subject, however, to such rules and regulations, as the legislature, from time to time, may think proper to make.*"

That part of the law relied upon as conferring the banking power is section 2. It provides, "that the corporation be, and they are hereby, made capable in law to hold any estate, real or personal, and the same to grant, sell, or dispose of; or to bind, by mortgage, or in such other manner as they shall deem most proper for the best interests of the corporation ; provided, that the express purpose of any gift or grant be answered."

Before proceeding to a careful examination of the powers here granted, it may be well to recur to the argument of defendants' counsel. It is not pretended, that, at this day, a grant of powers like these would confer the franchise of banking; but it is contended that, at the time this act of incorporation was passed, banking was not a franchise—there was no restraining law; and any individual, or any corporation, authorized to contract and be contracted with; to hold, sell, and dispose of property, without restriction, might engage in this business. The case of Attorney General v. Utica Ins. Co., 2 Johns. Ch. 377, is referred to as an authority. The remark of the chancellor, in that case, is: "The right of banking was formerly a common law right, belonging to *individuals*, and to be exercised at their pleasure; but the legislature \*thought proper, by the restraining act, to take away that right from all persons not specially authorized. Banking has now become a franchise." He says nothing about corporations. It belongs to "*individuals*;" but it does not follow that it belongs to corporations. Individuals have natural rights; corporations have not.

Although there was no restraining law in this state, at the time this act of incorporation was passed; and, although an individual might have engaged in this business, still, a corporation could not, unless the power was expressly granted; or, unless it was necessary, to carry into effect powers which were granted. The rule for construing acts of incorporation was the same then as now; and that rule is, "to consider corporations as having such powers as are specifically granted by the act of incorporation; or as are necessary for carrying into effect the powers expressly granted, and as not having any other." 2 Kent's Com. 298; 2 Cranch, 127; 4 Wheat. 636; 4 Pet 152; 8 Ohio, 286.



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Applying this rule of construction to the charter of the Granville Alexandrian Society, and it seems to us clear that the privilege of banking is not granted. The corporation has power to contract and be contracted with; and this power it must have, for its accommodation as a library association. It is made "capable in law to hold any estate, real or personal, and the same to sell, grant, or dispose of, or bind by mortgage, *or in such other manner as they shall deem most proper for the best interest of the corporation*; provided, that the express purpose of any gift or grant be answered." Here is no power of banking expressly granted. Is it necessary to carry into effect any of those powers which are granted? Beyond the power of contracting and being contracted with, it has power to hold property, real and personal; and it may "grant, dispose of, or sell the same." It is not necessary to exercise the power of banking in order to make contracts; or, in order to "grant, dispose of, or sell" property. Or it may bind such property by mortgage; or it may bind it "in such other manner" as it shall deem most proper for the best interests of the corporation. \*If, at the time of the passage of this law, there was a [13 mode of *binding* property, by exercising banking powers, as distinguished from binding by mortgage, well known and understood, then, possibly, by the grant of the power to *bind property in such other manner*, as the corporation might think proper, might be construed as granting, by implication, the power of banking. I can see nothing else in the law that would excite the least doubt whatever upon the subject.

But it is said by counsel, that in 1817, this court was called upon to give a construction upon this act of incorporation; and that it was then holden, that it did confer banking powers; and we are referred to the case of the Granville Alexandrian Society v. John Van Buskirk. If our predecessors have, after full consideration, in fact determined the identical question now presented to us, we ought not lightly to overrule their decision. We have a manuscript report of that case, showing the pleadings, the facts, and the judgment of the court. The reasons for that judgment are not assigned. It appears that the action was upon a promissory note, given by the defendant to one Samuel Davis, and by him indorsed to the plaintiffs, for \$250. The defense relied upon was, that the plaintiffs were a banking company, or association, that loaned money, and issued notes payable to bearer, contrary

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to the act of 1816, prohibiting the issuing and circulation of unauthorized bank paper, which act declares all notes discounted by such companies void. It was admitted by the plaintiffs, that they did loan money, and issue, by their officers, notes or bills payable to bearer, and had done so from 1815 to the time of trial; and that the note was discounted by them for the defendant; and that he received, for the note, the bills of the plaintiffs. It is said in the manuscript, that the only question made and argued, was, whether the charter of the plaintiffs authorized them to do a banking business. The case was submitted to the court at the August term, 1817. Judges Brown and Couch being present, it was taken under advisement, and finally decided in Belmont county, Judges Pease and Couch holding the court. Judgment was rendered for the plaintiffs.

14] \*The case seems to have been considered by three of the then judges of the court; whether they all concurred in the judgment finally rendered, we do not know. It was a decision made upon the circuit; for at that day there was no court in bank. Since the establishment of the court in bank, we have considered our own decisions, made upon the circuit, as of less authority than those made by a full court. In this decision, we have no evidence that more than two of the four judges concurred. The presumption is, that there was a difference of opinion; otherwise, why was the case taken under advisement? Taking all these circumstances into consideration, although the judgment of the court, in this case, would seem to have been predicated upon the supposition that the charter of the Granville Alexandrian Society conferred upon that corporation banking powers, we can not look upon it as an authority to justify us in so holding, when we do not, in our consciences, believe that any such powers were intended to be, or were, in fact, granted. It may not be improper to say, that the defense set up in that case, although it might have been a legal, was a most unconscionable, one. It was one which the court could not but have looked upon with disgust. The defendant had received that from the plaintiffs which had been as good and valuable to him as so much money, and he now undertook to shelter himself from payment, under a highly penal statute. Whether this consideration had any influence with the court pronouncing the judgment, I can not say. From my knowledge of the men, I am sure they would strive against any such influence. But that

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a strong desire to do strict justice between parties does sometimes lead courts away from strict law, there can be no doubt. It is a very common, and a very just remark, that hard cases frequently make bad precedents.

We are also referred to the opinion of Chancellor Kent, upon the extent of the powers granted by his charter. That opinion, however, is based, not upon the charter itself, but upon the decision of the court above referred to. The chancellor, if adjudicating this case, would probably hold that decision obligatory. We do not, for the reasons already stated.

\*But even if we are wrong in supposing that the charter [15 of this corporation did not confer upon it banking powers, we think it is within the laws restraining banking.

The first law of this kind was passed on February 8, 1815, and provides "that from and after the taking effect of this act it shall not be lawful for any individual, or company of individuals, to issue and put in circulation any note or order for the payment of money, struck or printed upon an engraved plate, and calculated to circulate as a bank bill or note, unless such individual shall be, by law, *specially* authorized so to do; or unless such company shall be incorporated by law for that purpose." 2 Chase's Stat. 868. There is no pretense that express power is conferred upon this society to do banking business; it is only by implication that it is claimed for it. This law, then, would be sufficient to restrict it in the exercise of this implied power; and it was passed before this power was exercised by this society.

The next restraining act is the act of January 27, 1816, "to prohibit the issuing and circulating unauthorized bank paper. Swan's Stat. 136. This act prohibits the exercise of banking powers, except by "banks incorporated by a law of this state." It can hardly be pretended that the Granville Alexandrian Society is, within the meaning of this statute, "a bank incorporated by a law of this state." It is a society incorporated as a library society, claiming the implied powers of banking, which it is prohibited from exercising by this law.

But it is said that if these restraining acts are construed to include this corporation, then so far they are unconstitutional, as taking away vested rights.

That the legislature, having granted powers to a private corporation can not, consistently with the constitution, take away

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those powers, without any default on the part of the corporation, is too well settled by any who regard the stability of the law, the authority of judicial decisions, or the safety of our institutions. And even where a corporation has violated its charter, it is rather a judicial than a legislative question whether such violation is a 16] cause of forfeiture. \*But the legislature may, and in most, if not in all cases, it is well that they should, in the acts of incorporation which they pass, retain the power of modifying, changing, and altering, as occasion may require. They have done it in the charter of the Granville Alexandrian Society. The corporation is created, and the powers granted, "subject, however, to such rules and regulations as the legislature, from time to time, may think proper to make."

Can there be any doubt that, under this saving clause, the legislature would have had the power, on the day on which they passed these restraining laws, by a private act, to have said that this corporation should not exercise banking powers and privileges? We think not. And if the corporation would have been bound to obey a private law of this character, it certainly should be bound to obey a general law intended to effect the same object.

It has been argued by defendant's counsel that there has been, so far, a recognition, by the supreme power of the state, of the power of this corporation to exercise the banking franchise, as, in fact, to confirm to it the right. There is force in the argument, and it would seem difficult to escape the conclusion that the authorities of the state have considered this as a banking institution. It has been so treated by the auditor of state and by the banking commissioners. It has paid a tax like the other banks, since this tax has been appropriated by the legislature. The state, by its agents, have borrowed money of it to carry on its public works, and although, by the reservation in the charter, the legislature might, at any time, have passed a law prohibiting it from issuing paper or exercising banking powers, it has done nothing of the kind, except what is contained in the general restraining law. The only act ever done by the general assembly, so far as we know, manifesting dissatisfaction at the course pursued by this corporation, was the adoption of the joint resolution directing the information in this case to be filed. Still, it seems to the court that these things can not properly be taken into consideration in deciding upon the validity of the first plea of the

\*defendants. The simple question presented by that plea [17] is, whether, by the act of incorporation, as originally passed, banking powers were vested in this corporation. We think they were not, and we therefore hold that the plea is insufficient, and can not operate as a bar to the information.

This plea being disposed of, it becomes necessary to turn our attention to the third plea, to which there is also a demurrer.

This prosecution is in pursuance of the act of March 17, 1838, entitled "an act relating to informations in the nature of *quo warranto*, and regulating the mode of proceeding therein." Swan's Stat. 769.

In section 26 of this act, it is enacted, that "nothing in this act contained shall authorize any proceeding against any corporation, for forfeiture of charter, unless the same shall be commenced within five years from the time of the exercise of the power, or the act of omission alleged as the cause of forfeiture; and no proceedings under this act shall be sustained against any corporation, on account of the exercise of any power or franchise under its charter, which shall have been used and exercised for the term of twenty years prior to the commencement of such proceedings; nor shall any proceeding be commenced under this act against any officer, to oust him or her from office, unless such proceeding shall be commenced within three years next after the cause of such ouster or right to hold such office shall have arisen; provided, that such proceedings under this act may be had, and the same shall not be barred, in any of the above cases, if commenced within two years from the passage of this act."

It will be seen that by this section three classes of cases are provided for. If the proceeding be against a corporation for the exercise of a power not granted, or for an act of omission, it must be commenced within five years from the exercise of the power, or of the omission to act. If it be for the exercise of a power or franchise, it must be within twenty years from the commencement of the exercise of the franchise. In other words, if this power or franchise has been exercised for the term of twenty years, the right to exercise it can not be questioned \*under this act. If [18] the proceeding is against an officer, to oust him from office, it must be commenced within three years after the cause of such ouster shall have arisen.

But there is annexed a provision, that if the proceedings are

commenced within two years from the passage of the act, none of the above causes shall operate as a bar.

The third plea in the case, now under consideration, is framed, or intended to be framed, under this section of the statute.

It sets out that the defendants, "on August 1, 1815, at the town of Granville aforesaid, established a bank, in the name and by authority of the corporation, and became the proprietors of a fund, for the purpose of issuing notes, receiving deposits, making discounts, and transacting all other banking business; and did then and there, in their corporate name and authority, issue notes, receive deposits, and make discounts, and use and transact all other banking business; and that from the said 1st day of August, hitherto, *and for more than twenty years successively*, next preceding March 17, 1838, have, *from time to time*, issued notes, received deposits, and made discounts, and transacted other banking business. And during all said term, without intermission, have kept up, by electing and swearing into office their directors and other officers, their organization as a bank, and upon all dividends by them declared, in their banking business, have paid the lawful tax to the State of Ohio as a banking corporation."

It is objected to this plea, that the distinct facts set forth in this plea do not, separately considered, amount to evidence of the exercise of the franchise of banking. For instance, that the election and swearing into office of officers during a period of twenty years, is not such a user of a franchise as to confer a right. This is certainly correct, and if the plea contained nothing further, it would unquestionably be bad.

It is further objected, that having "from time to time, issued notes," etc., is not such a user of the franchise of banking as to confer a right. This also is true, and if nothing beyond this had been stated in the plea, it would have been defective.

19] \*The whole plea must be taken together, and if, taking the whole together, it shows that the defendants have, for the term of twenty years and more, used the franchise of banking, as that franchise is ordinarily used by banks, upon which it is expressly conferred, it is sufficient. This franchise is exercised, not by the performance of a single act, but of a variety of acts, which, taken together, constitute the business of banking.

The prosecuting attorney, however, complains that this plea is double, because it undertakes to set forth this variety of act. It

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is not so. Several matters are stated, such as the discount of notes, the issue of notes, the election of officers, etc., but they all conduce to establish one proposition, the use of banking powers.

The question is, whether the plea does, in fact, set forth the use, by the defendants, of the banking franchise for twenty years, as that franchise is ordinarily exercised by banks.

It sets forth, that, during all the time stated in the plea, the corporation "have, without intermission, by election and swearing into office of their directors and other officers, kept up their organization as a bank." This is in conformity with the practice and usage of banks. It further sets forth, that, from August 1, 1815, "hitherto, and for more than *twenty years successively*, next preceding March 17, 1838, they have, from *time to time*, issued notes, received deposits, and made discounts, and transacted other banking business." This, too, we suppose to be in strict conformity to the usages of incorporated banks.

It seems, however, to be apprehended by the prosecuting attorney, that the expression "from time to time" implies that there has been a cessation of this user, and that it has not been continuous. The allegation of the plea is, "that *for more than twenty years successively*, next preceding," etc., notes, etc., were "from time to time" issued, etc.; not that it was done "from time to time" during a period of twenty years. No bank is perpetually, continually, daily engaged in receiving deposits, making discounts, and issuing notes. All these things *are* done "time to [20 time," at set times, or, as occasion may require.

From a most careful examination, we are brought to the conclusion that this plea is well pleaded, and that it is sufficient, in law, to bar the prosecution.

It is claimed, however, that this information having been filed in pursuance of a joint resolution of the general assembly, that resolution operates as an extension of time within which an information may be filed, so far as this corporation is concerned; and, further, that the commencement of this prosecution must be dated from the time an application was made to the court for leave to file an information. This application is said to have been made in September, 1839. So far as relates to this last position taken, it is sufficient to say that we are now inquiring as to the validity of a plea, and must be confined to the record. In the record, there is nothing to show that application was ever made to this

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court for leave to file an information against the defendants. And if there were, it would be a strange inference to draw, that, because this court refused leave to file an information, therefore, an information was filed, and proceedings commenced.

As respects the resolution of the general assembly, directing this information to be filed, it does not purport to interfere with, or change, the *quo warranto* law. That law directs that an information *may* be filed by the prosecuting attorney, "upon leave granted by the supreme court, in term time, or, by any judge thereof, in vacation," "and *shall* be so filed when the same shall be directed by the governor, the general assembly, or the supreme court." When the information is filed, no matter whether it is done on leave granted, or by direction of the governor, general assembly, or supreme court, the proceedings must be according to the law, and the decision of the case must be according to the law. We can not look back to see whence the order for the commencement of the proceedings emanated, and vary our decisions accordingly.

The court being unanimous in the opinion that the third plea is sufficient, it is unnecessary, at the present time, to go further into the case.

21] \*The prosecuting attorney can have leave to withdraw the demurrer, and reply. If this is wished, the case will be continued, and remanded to the county. If not, then judgment will be entered for the defendant.

[NOTE.—Upon the suggestion made by the court, the case was continued, and remanded to the county of Licking, and leave given both parties to amend the pleadings.]

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WILLIAM M. TOWNSEND v. P. AND G. CARPENTER.

The assignee of a note, not negotiable, may sue the maker in chancery to enforce payment.

THIS is a bill in chancery, from the county of Fairfield.

The bill is filed by the assignee of a note, not negotiable, against the assignor and maker, setting up, in avoidance of the right of



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set-off by the maker, a promise to pay, made by the maker to the assignee, after notice of the assignment.

The bill charges that on January 7, 1839, Paul made this note to Gabriel Carpenter, for \$1,500. That on the same day, Gabriel indorsed it to the plaintiff, of which fact Paul, at the time, had notice from the complainant. That at the time of the assignment Paul had no demand against Gabriel which could be set off against the note in the hands of Gabriel; that at the maturity of the note, and frequently afterward, Paul promised to pay to the complainant the amount due on the note. The bill then alleges that he has never paid the same, and pretends to have claims as set-offs against the note.

Paul Carpenter, the maker of the note, in his answer, among other things, avers that after the transfer of the note, Gabriel promised that he would give the respondent \$50 a week to pay on the note; that the respondent so told the complainant, [22 and the complainant expressed a belief that Gabriel would do so; and the respondent, in that event, promised to pay the complainant; he avers that he never promised except upon this condition. The testimony of several witnesses has been taken for the purpose of establishing the charges in the bill.

GRIMKE, J. The first and principal question to be decided is, whether an assignee of a note has a right to maintain a suit in this court. The note is not negotiable; the consequence is that an assignment of it does not transfer the legal, but only the equitable interest in it. This is obvious from the fact that the assignee, if he does sue at law, is compelled to make use of the name of the assignor. Notwithstanding the assignments, the legal interest remains in the assignor; and as he alone who has the legal interest in the subject matter can maintain a suit, the action, although it is brought for the benefit of the assignee, must still be brought in the name of the assignor. It is not even necessary to notice the name of the assignee on the record, as that it is for his use; hence the term *assignment* has been appropriated to signify the transfer of a note not negotiable, and *indorsement*, to signify the transfer of a note which is negotiable. It would seem to follow, therefore, that if the transfer of a note which is not negotiable, does convey the merely equitable interest in it, that the assignee has a right to maintain a suit in chancery against the maker to

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enforce the payment of it. There could be no doubt of this, if it were not that courts of law, in very modern times, have been disposed, in an indirect manner, to protect the interests of the assignee when he sues in the name of an assignor; and, in consequence of this, a single court has determined that a court of chancery is deprived of its jurisdiction. Such is the decision in the case of *Mosely v. Grouch*, 4 Rand. 592. But I do not know another case where it has been held that a court of law having once declined jurisdiction of a particular subject matter, and afterward, in an indirect manner, entertained it, that a court of chancery, to [23] which it appropriately and originally \*belonged, is, therefore, deprived of it. The course now pursued by the courts of law constitutes a part of its practice, while that pursued by the other court is not merely a part of its practice, but grows out of its original constitution and the nature of the interest which is the matter in controversy.

Story, in his treatise on Equity, does not treat this as a doubtful question. He seems to take it for granted as an acknowledged principle. "In order," he says, "to constitute an assignment of a debt, or other chose in action, in equity, no particular form is necessary. Indorsing and delivering a bond to an assignee amounts to an assignment of the bond. An assignment of a debt may be by parol as well as by deed." 2 Story Eq. 311. I think, then, that the first question—has the assignee a right to sue in chancery?—must be answered in the affirmative.

The bill alleges that on the day this note for \$1,500 was assigned to the complainant, he gave notice to Paul Carpenter, and that when the note became due, and frequently afterward, the latter promised to pay him the amount. The answer admits notice a short time after the date of the note, but denies that he ever made any promise to pay, except upon the condition that Gabriel Carpenter, the assignor, would procure his discharge from his liability as security for Gabriel, or furnish him money to pay the note. But the depositions of Hunter and the two Townsends expressly contradict this assertion in the answer, and show that Paul Carpenter did make an express promise to the complainant to pay him. If it should be said that this promise, at any rate, gives a right to sue at law, it may be answered that a promise by the maker can not divest a third person, the assignor, of his legal

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interest, so far as to deprive a court of chancery of at least concurrent jurisdiction.

Decree for the complainant.

No arguments came to the reporter's hands.

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**\*THE STATE OF OHIO, EX REL. PHILIP OWENS ET AL. v. THE [24  
TRUSTEES OF SECTION 29, FRACTIONAL TOWNSHIP 3, RANGE 1,  
DELHI TOWNSHIP.**

Before any denomination of Christians can be entitled to any part of the ministerial fund, arising from the rents of section 29, they must have formed themselves into a society, in the township in which the section is located, and have given themselves a name.

The agent appointed to receive said fund must have been appointed by the society, as a collective body, and not by the individual members of the society

THIS is an alternative mandamus from the county of Hamilton.

At the April term of said court, 1840, by order of court, an alternative mandamus was issued, commanding the defendants to pay over to the "Roman Catholic Church of Delhi township" an equal dividend of the rents of section No. 29, in said township, due for the years 1837, '38, '39, or to appear before the court forthwith, and show cause why the same should not be paid over.

The defendants appeared, and time was given to make return, and on September 14, in the same year, the return was filed.

In this return the defendants allege:

1. That there is not now, and never has been, in said township of Delhi a society formed and organized by the name of the "Roman Catholic Church of Delhi township," for the purposes of religious worship; and they deny that all those who are claimed by the relators to belong to such society are citizens of said township.

2. They deny that they have refused to pay to the Roman

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Catholic Society of Delhi, or their authorized agent, appointed by said society, their proportion of the rents arising from section No. 29, for the years specified, but aver, on the contrary, that at all times when the agent of the relators presented himself for said years, they informed him that when he would produce evidence 25] that the relators were \*citizens of said township; that they were regularly organized as a religious society, by the name of the Roman Catholic Society, or Church, of Delhi township, and that the agent was appointed at a regular meeting of said society to receive said rents, they would pay the same. They allege, however, that this evidence has never been furnished, although often promised.

To this return no demurrer, plea, or answer has been filed. It stands upon the record uncontradicted, and is in no way controverted. Testimony has been taken both by the relators and defendants. As that testimony is cited and commented on in the opinion of the court, it is unnecessary here to recapitulate it.

CAREY & CALDWELL, for the relators.

STORER, RIDDLE & ROLL, for defendants.

HITCHCOCK, J. This case is presented to the court in somewhat of a singular aspect. A mandamus was issued on the relation of Philip Owens and others, claiming to be the members of the Roman Catholic Society of Delhi township, to which a return was regularly made by the defendants. The statute regulating proceedings in cases of this description, requires "that whenever a return shall be made to any such writ, the person prosecuting such writ may demur, or plead, to all or any of the material facts contained in the said return; to which the person making such return shall reply, take issue, or demur; and the like proceedings shall be had therein, for the determination thereof, as might have been had if the person prosecuting such writ had brought his action on the case for a false return." In the case before us, this provision of the statute has been entirely disregarded, and there is neither an issue in fact, nor in law, joined. It would be right to send the case back to the county, with directions to have an issue made up. But as testimony has been taken and the case argued, although we do not intend to sanction the course of practice pursued, we shall not 26] decline to go into its consideration. The counsel \*for the respective parties seem to have treated the case as if the return had

been traversed ; and they also raise some questions of law, as to the effect of the return, provided the court shall consider it as having been proven to be true.

Before referring to the testimony in the case, it is proper to settle the principles of law by which it must be governed.

In the sale of land by the United States to the Ohio Company, and to John C. Symmes, section 16 in each township was reserved for the use of schools, and section 29 for the use of religion in the township. In other sales of public lands by the United States, section 16 has been in like manner reserved, but not section 29. These sections thus reserved for religious purposes have usually, in common parlance, and sometimes in legislative enactments, been denominated ministerial sections.

In section 26, of article 8, of the constitution of the state, it is provided that "laws shall be passed by the legislature which shall secure to each and every denomination of religious societies in each surveyed township, which now is, or may be hereafter formed in the state, an equal participation, according to their number of adherents, of the profits arising from the land granted by Congress for the support of religion, agreeable to the ordinance or act of Congress making the appropriation."

In accordance with this injunction of the constitution, the general assembly have, from time to time, as seemed necessary, acted upon the subject. The law now in force in relation to it, is found in the act of March 14, 1831, "to incorporate the original surveyed townships." In section 13 of this act, it is provided that "each and every denomination of religious societies, after giving themselves a name, shall appoint an agent who shall produce to the trustees a certificate containing a list of their names and numbers, specifying that they are citizens of said township; and the agent shall pay over an equal dividend of the rents within three months after they shall have been received, to be appropriated to the support of religion, at the discretion of each society; provided \*that [27 all members, above the age of fifteen years, shall be entitled to have their names enrolled by any society." And in section 15 the trustees of each incorporated township are required to meet on the first Monday in January, annually, and make a dividend of the rents to each religious society; "and in making such dividend, each society shall be entitled to receive a just proportion of the money received by the treasurer."

It is clear that this fund is intended for the support of religion in the township in which the section is located, from which it is derived, and can not be appropriated for any other purpose, or for the support of religion in any other place.

It is to be distributed to the different religious societies in proportion to their numbers; and in ascertaining numbers, all actually belonging, or adhering, to each society, of the age of fifteen years, or more, are to be taken into the account, provided "they are citizens of said township."

Here a question is raised as to the meaning of the word "*citizens*," as used in this connection. That this word does not always mean one and the same thing is clear. Thus, we speak of a person as a citizen of a particular place, when we mean nothing more by it than that he is a resident of that place. When we speak of a citizen of the United States, we mean one who was born within the limits of, or who has been naturalized by, the laws of the United States. It can hardly be believed that the legislature, in using the word "*citizen*," in this statute, intended to make a distinction between native or naturalized citizens, and resident aliens. Why should such distinction be made? Is there not as much need of religious instruction in the one case as the other? To me it seems clear that the word *citizen*, as here used, should be held to be synonymous with the word *resident*. The legislature did intend that, in ascertaining numbers, none but such as were residents of the township should be included. But if there is any doubt upon the subject, that doubt must be removed upon reference to the constitution. We are bound so to construe every law, if possible, that it shall not conflict with the constitution. 28] \*If it can not be so construed, then it must be rejected, for a legislative act which is in violation of the constitution can be of no binding force. The provision of the constitution, as already cited, is, that laws shall be passed, securing to each and every denomination of religious societies "an equal participation, according to their number of adherents, of the profits arising" from these lands. If a person who is not a citizen can be an *adherent* of a religious society, this section of the constitution has secured to him a participation in the profits of these lands. It is clear, then, that this law is not such as is required by the constitution, unless we hold the word *citizen*, as here used, to mean the same as *resident*.

But before any claim can be made upon the trustees, the sect claiming must have formed themselves into a society, and must have given themselves a name. It is not enough that there are individuals who are members of Christian churches, residing within the township. A society must be actually formed, and known by name. A religious society is made up of individuals associated together for religious purposes. As to the particular mode or manner of constituting or forming this society, it is immaterial. Each denomination of Christians may form their societies according to the usual practice or custom of their sect. But the society must be formed, and must have a name.

The society thus formed, must appoint an agent. This can not be done by the individual members of the society, by subscribing a paper constituting an individual an agent; but it must be done by vote of the society, as a collective body.

This agent must be furnished with a certified list of the number and names of the members of the society, residing within the township, over the age of fifteen years.

The society having been thus formed, and having appointed their agent, are entitled to a share of the fund, in proportion to their numbers, upon the production by the agent to the trustees, of the certified list of numbers and names.

Before the trustees can be justified in distributing any portion of this fund to any agent, they must have satisfactory evidence that a society has been organized, and has a name, and that an agent has been appointed. The proof of the appointment of the agent should be verified by something more than his own statement.

Such we understand to be the law upon this subject, and it remains to apply it to the case before us.

The first reason assigned by the defendants for not obeying the alternative mandamus is, that there is no such religious society in their township as the "Roman Catholic Society of Delhi township," regularly organized and having that name.

Much testimony has been introduced upon this point by both parties. Without recapitulating it, it is sufficient to say that it is altogether vague, and of such a character as to satisfy us that there never has been any organized society of that name in the township. There are many Catholics in the township, and efforts have been made to effect an organization, not for religious wor-

ship, but for procuring a portion of this fund. But the law has not been complied with. Three persons have been examined to prove an organization. The first of these is Philip Owens, the principal relator. He states, among other things, as follows: "We organized, *as well as I remember*, in the year 1834, a Roman Catholic Society in Delhi township, for the purpose of becoming a body of people, and to receive our proportion of the ministerial fund." When inquired of as to the name of the society, he says it was the "Roman Catholic Society of Delhi township." James Cahill speaks of a society organized; and when inquired of as to the name, he says it was "Catholic." Anthony Hannah, another witness, says that in January, 1839, he was at the formation of a society of Catholics in Delhi township, and that the name was the "Roman Catholic Society." He afterward says that the society had been previously formed, but that he had never before attended. These are the only persons who know anything about the formation of a society, which is said to consist of about one hundred and fifty members; and it is, at least, a little singular that no two of them agree as to the name. When called upon for 30] their books, or other written evidence of the formation or existence of a society, none were produced; and when the defendants called at the place where they were informed such documents could be found, they were not there; but it was said they had been carried away to town to be fixed. As yet, however, they have never been exhibited.

This testimony falls far short of satisfying our minds of the existence of such a society as is claimed; and might be well rejected by the trustees, as not furnishing such proof.

The second cause alleged why the mandamus was not obeyed is, that the defendants did not refuse to pay over the money to the Roman Catholic Society, but only *required proof* of the formation of such society, of the appointment of an agent, and of the correctness of the list, and proffered, if such proof was given, to pay over the money; but no such proof was exhibited.

This allegation is sustained by the evidence. The only testimony to contradict is, that three instruments of writing were produced to the trustees, all of which are of similar purport. One of those instruments of writing is as follows, to wit: "We, the undersigned, citizens of the township of Delhi, Hamilton county, Ohio, composing the Society of Roman Catholics of said town-



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ship, claiming to have the benefit of the ministerial appropriation for said township, for the year 1838, do appoint Philip Owens our agent, to receive our *proportions* of said fund, and receipt for the same accordingly. As witness our hands, this December 23, 1838." Then follow the names of ninety-seven individuals, after which the following certificate: "Certified by Philip Owens, agent for the society." The entire document, signatures and all, was proven to be in the handwriting of Philip Owens. And, in addition to this, there was the testimony of one witness, that he had heard that there was a Roman Catholic Society in Delhi.

This evidence was not sufficient to prove the existence of the society, nor the appointment of the agent who made the application, without which proof the trustees could not have been justified in paying over the money. Besides, it was suspicious upon the face of it. And these suspicions were \*increased by the [31 testimony of a witness, who stated that Owens went about among the people, with a paper similar to the foregoing, to get names subscribed to it, and that he procured one person, at least, to subscribe to it, who was not of the Catholic faith, by assuring him that that would make no difference; and, by assuring him further, that the money, when procured, should be distributed in equal proportions to those whose names appeared on the paper.

Taking the whole case into consideration, the court are of opinion that the return is sufficient in law, and that the facts therein stated are true. Judgment will therefore be entered for the defendants. Judgment for the defendants.

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 H. C. WATKINS v. JAMES COLLINS ET AL.

The chancellor often refuses to aid in the execution of contracts which he would not rescind.

THIS is a bill of review from the county of Hamilton.

The present defendants were the original plaintiffs, and were the heirs of Elizabeth Merritt. The original bill was brought to set aside an exchange of part of a lot in Cincinnati, with Watkins, for a leasehold interest in another lot, which they aver was of

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grossly unequal value, and brought about by a fraudulent combination of Watkins and Harwood. The fraud is denied by answer.

WRIGHT, WALKER and MINER, for the plaintiff:

The single question is, whether the bargain between Watkins and Mrs. Merritt was made out by the proof to be fraudulent on the part of Watkins?

32] \*1. Watkins never negotiated with. Mrs Merritt, but refused to do so. It can not therefore be said that he took advantage of a woman.

2. Harwood was the friend and stepfather of Mrs. M.; had often acted for the family before; had no interest in the matter; and did not collude with Watkins. He carried on the negotiation for Mrs. M., and fully understood the whole matter. On him no deception could have been practiced, and none was attempted.

3. Mrs. M., although feeble in health, when she executed the deed, perfectly understood what she was about, and afterward attended to business herself. Her mind was as good as ever.

4. If she misunderstood the nature of the lease, it was not the fault of Watkins, for he first read the lease to Harwood, and then gave it to him to examine. He took it home, and says he explained it to Mrs. M. To us, however, this is immaterial. She chose Harwood as her agent, and we dealt with him.

5. There was, then, no actual deception, or misrepresentation. Watkins dealt fairly and openly. He offered to refer the matter to disinterested men; but Harwood and Mrs. M. preferred taking his offer.

6. If, then, there be any ground for annulling the bargain, it must be mere inadequacy of consideration. And the doctrine is, that this must be so gross and palpable as to shock the conscience. Then it affords a violent presumption of fraud. *Knobb v. Lindsay*, 5 Ohio, 468; *Steele v. Worthington*, 2 Ohio, 182; *Gregor v. Duncan*, 2 Des. 636; 1 Story on Equity, 249.

7. The case, then, is reduced to a mere question of fact, and requires a brief discussion of the evidence, an abstract of which is given in the bill of review. The transactions took place in August, 1834. Mrs. M.'s land was unimproved, and she was in want of money. The leasehold property was improved, and would yield income. Just previous to the bargain, she had offered to

sell the best part of her lot to William Holliday, at ten dollars per foot, by the advice of Harwood and one Allen, who \*now swears it was worth twenty-five dollars. At this rate [33 her whole lot would only have brought \$1,030. But taking the average of estimates by the eight witnesses, who testify as to its value, viz., Holliday, Allen, Wilder, Pancoast, Paris, Bonsall, Hathaway, and Loring, it did not, in 1834, exceed \$2,300; and in return for this, she was to receive \$400 in cash, and the leasehold property. The buildings on this, taking the average of three witnesses, viz., Avery, Loring, and Broadbuss, were worth \$1,600. This, then, was a consideration of \$2,000, for what was worth, at most, \$2,300, but which Mrs. M. herself would have sold for \$1,030. The lease was to expire in 1838; but there was a privilege of purchasing at sixteen dollars per foot, when Loring swears it would have been worth twenty dollars. But supposing it was only worth sixteen dollars, there would still be a consideration of \$2,000 for \$2,300. But this is not all: Mrs. M. needed money, and got it. The lowest estimate of rent she would receive would considerably more than pay the ground rent, which was eighty-two dollars per annum. Watkins was to give six dollars per month, or seventy-two dollars per year, for the smaller building. Suppose the larger to yield no more, there would have been \$144 per year, or a surplus of sixty-two dollars per year.

In any view, therefore, of the case, there is no such inadequacy of consideration as would justify the inference of fraud by a court of equity, especially in the absence of all proof of deception by Watkins.

We feel well convinced that if the court will but carefully examine the evidence in this case, the decision heretofore had will be reversed.

STORER, for the defendant, insisted that the inadequacy of price was so great as to shock the moral sense, and is, therefore, *per se*, evidence of fraud.

LANE, C. J. It is a well established equitable principle that the chancellor would not, in many cases, rescind contracts, which he would not aid to execute. It is equally well established that mere inadequacy of price is not a sufficient ground \*to rescind, [34 unless it be so gross as to carry evidence of fraud. The plaintiffs

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are, therefore, not entitled to sustain the present bill, unless they show some positive fraud, in which Watkins participated.

Mrs. Merritt had a fee-simple property, worth \$2,500 or \$3,000. In exchange for this, she got a leasehold, having four years to run, and the sum of \$400. The annual productive value of the lease was a little more than \$100; and it was subject to an annual ground rent of \$82, and the taxes. There was a privilege of purchasing the leasehold, at its expiration, at a stipulated price; but it is doubtful if this privilege was worth anything. Here was a property worth \$2,500, acquired for a consideration which we do not estimate worth more than \$500.

If the contract had been made between persons standing on equal footing, and aware of their rights, we might set down Watkins as being the fortunate holder of the fair side of a sharp bargain. But the person with whom he dealt was a woman somewhat advanced in life, feeble, sickly. She had no property except this. She had been assisted occasionally with money, by Harwood, her stepfather; but he had declined advancing any more, and she was driven to the necessity of selling this land for support.

The bargain was made through the agency of Harwood, who represented to her that the property she would receive was a fee simple, and productive, while her own was only a vacant lot.

There is, then, the most abundant reason to believe Mrs. Merritt deceived; but Watkins is not chargeable with the consequences, unless he was a party.

He shows he declared he would not deal with a woman, but required the bargain to be entered into by some of her friends, and he offered to leave the price to arbitration. He shows he fully explained the terms of the lease to Harwood. He likewise shows, through the agency of Harwood, he purchased the rights of other heirs of Culbertson Parks upon terms less favorable—a fact, which, 35] without denying that Mrs. Merritt was \*cheated, only discloses that her brother and sister were cheated worse.

But, on the whole case, a man after acquiring the interests of a set of heirs successively, at a most startling undervalue, through the agency of their stepfather, is found grasping the inheritance of the last, an impoverished and sickly woman, through the active fraud of the same instrument, for one-half its worth. I do not believe an honest man would have done it

Bill of review dismissed.

THE LESSEE OF MARTHA PATTERSON ET AL. v. THOMAS PRATHER  
ET AL.

A valuation of improvements, etc., under the occupying claimant law, is invalid unless reasonable notice of making it be given to the adverse party, or his attorney of record.

THIS is a motion from the county of Brown.

HITCHCOCK, J. The question arising in this case was submitted without argument.

At a former term of the Supreme Court in the county of Brown, a judgment was rendered in this case in favor of the plaintiff, and the proceedings stayed by order of court, on the application of the defendants for the benefit of the law for the relief of occupying claimants of land.

At the last term of the court, the jury summoned by the sheriff to value the improvements, made a return to the clerk of the court, pursuant to law. This return was objected to by the plaintiffs, on the ground that no notice had been given of the time at which the valuation was to be made. And for the purpose of settling the practice in cases of this description, the case was reserved.

\*These proceedings under the occupying claimant law have [36 been considered by this court as being separate and distinct from the action of ejectment, although the judgment in the ejectment case can not be carried into execution until they are closed. And when the application is made by the defendant and a judgment is given in his favor, the court will order the lessee of the plaintiff to pay the costs. 1 Ohio, 156.

The statute provides that a jury may be called for the assessment of damages and for the valuation of improvements, by either party; and the jury are to be drawn in the same manner as they are required by law to be drawn in other cases. And if the jurors drawn do not all attend, or if any of them are of kin to either of the parties, the sheriff is authorized to summon talismen to fill the panel. If the jurors report a sum in favor of the plaintiff in ejectment, the court is required to render judgment therefor without pleadings, and issue execution thereon as in other cases. Whether

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the report is favorable or unfavorable to the plaintiff, he is barred of his action for mesne profits. If the report of the jury is in favor of the occupying claimant, the plaintiff can not have execution on his judgment until he has first paid the amount assessed against him by the jury, unless he shall elect to convey the land to the occupying claimant at its appraised value, and the claimant shall have neglected or refused to make payment.

All these circumstances go to prove that the proceedings under this law are far from being *ex parte*. They are, in their progress and results, of as much interest to the parties as ordinary proceedings usually are. As a general rule, parties to be affected by judicial proceedings should have notice. No express provision is made, however, by this statute, that notice shall be given. But this court is authorized to regulate its practice, not interfering with express legislative enactment. The only objection to requiring notice is, that by possibility, the party to be affected thereby may be a non-resident. In such case notice might be given to the attorney, as in cases of error. In any view which we can take of the case, it seems to us proper and necessary that notice should 37] be given; and \*as it was not done in the case before us, the return of the jurors is set aside, the costs to abide the final disposition of the case.

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 TRUSTEES OF WILLIAMSBURG v. TRUSTEES OF JACKSON.

Where a new township is set off, all persons residing within its limits, and who have resided there long enough to obtain a legal settlement in the original township, have a legal settlement in the new township.

A notice, warning one to depart the township, signed by but one of two overseers of the poor, is void.

THIS is an action of debt from the county of Clermont.

It is submitted to the court upon the following statement of facts:

The township of Williamsburg originally embraced all the territory constituting the present township of that name, and a large part of the present township of Jackson. On June 24, 1834, the

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township of Williamsburg was divided, and the township of Jackson set off and established. For three years before the division, Allison Hiatt and family resided in the township of Williamsburg, but within the limits of the present township of Jackson. At the time of the division, and for some time thereafter, they continued to reside in Jackson township, in distressed circumstances, depending principally for subsistence upon the charity of the neighbors.

About December 25, 1834, said Hiatt and family removed from Jackson into Williamsburg township; and, in June, 1835, the son of said Hiatt, being injured by a fall from a tree, was in need of temporary relief and support. Medical attendance, etc., was furnished him by the overseers of the poor of Williamsburg. The boy was not in a situation to be removed, but died, and was buried at the expense of Williamsburg\*in September, 1835. During [38 the summer of 1835, Mrs. Hiatt was sick, and in need of temporary relief, which was furnished by the overseers of Williamsburg. The expense incurred in affording relief to the boy and his mother amounts to \$57.75. After this relief had been afforded, notice of the same was given to the overseers of the poor of Jackson, and payment demanded in the month of October, 1835, which was refused. Demand was once made in Williamsburg, and once in Batavia, but was made by but one only of the overseers of the poor of Williamsburg.

From December 25, 1834, to the present time, Hiatt has continued to reside in the township of Williamsburg. On March 31, 1835, a notice, signed by one of the overseers of Williamsburg, was served on Hiatt and family, commanding them to depart from the bounds of said township. This notice was served by James Perrine, constable; was returned, and recorded in the township records within three days.

The overseers of Williamsburg continued to furnish Hiatt's wife and family with medical attendance and necessaries, through the years 1836, '37, and '38.

LOWE, for plaintiff.

FISHBACK, for defendants.

HITCHCOCK, J. In this action the plaintiffs seek to recover compensation for expenses incurred in furnishing temporary relief to certain paupers, which they claim had a legal settlement in the township of Jackson. The agreed state of facts presents a num-

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ber of questions, which, although perhaps of no particular difficulty, are of interest to the community, as growing out of the laws for the relief of the poor. Not being aided by the arguments of counsel, we must settle these questions as best we can from the lights we have.

The first question which presents itself is, as to the place of legal settlement of Allison Hiatt. Previous to the division, his [39] legal settlement was in the township of Williamsburg. Upon the division, he fell within the limits of the township of Jackson. It has already been decided, that upon the organization of a new township, all persons residing within its limits at the time of organization, and who had a legal settlement in the township or townships from which such new township was taken, have a legal settlement in such new township. *Center Township v. Wills Township*, 7 Ohio, 171. Such, we understand to be the law of the state; and were we to hold otherwise, it would follow that no person could have a legal settlement within a newly organized township until one year after its organization. Upon the organization of the township of Jackson, Allison Hiatt had a legal settlement in that township; and if he became chargeable as a pauper before this settlement was changed, this township was legally liable for his support.

The next inquiry is, whether he has gained a legal settlement in any other township. In December, 1834, he removed with his family into the township of Williamsburg, and had resided there up to the time of the commencement of this suit, a period of more than four years. "Any person residing one year in any township of this state, without being warned by the overseers of the poor for said township to depart the same, or three years after being once so warned, without being again warned as aforesaid, shall be considered as having gained a legal settlement in such township." *Swan's Stat.* 634. Hiatt, then, gained a legal settlement in Williamsburg, unless, within the first year of his residence there, he was legally warned or notified to depart the same. On March 31, 1835, a notice was served upon him in due form, to depart from the township. This was in due time, but the notice was signed by one only of the overseers of the poor. Was it legal? In section 4 of the act for the relief of the poor, it is provided that "the overseers of the poor, upon receiving information that any person has come within the limits of their township to reside, who will be



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likely to become a township charge, shall issue *their* warrant, or order, to any constable of *\*the* township, commanding such [40 constable forthwith to warn such person to depart the township," etc.

The act to be done is the joint act of the overseers, not the separate act of one of them. They are required to issue "their warrant." Such would seem to be the plain intent and meaning of the law.

In the case of *Downing v. Rugar*, 21 Wend. 178, the Supreme Court of New York seem to have decided, that one of two overseers of the poor may perform an act which the law requires the two to perform, if it becomes necessary to prevent a failure of justice. The court recognize the principle, that where an authority is conferred upon two, nothing can be done without the consent of both; but hold that, although the act is done by one only, the consent of the other shall be presumed. And, further, that this presumption shall not be rebutted by any other evidence, than the testimony of the individual, who is presumed to have given his consent. The reasoning of the court in this case, as well as the decision, seems to us as being somewhat extraordinary; and we do not feel disposed to adopt either, in giving construction to the statute now under construction. We prefer to follow the rule adopted in the case of *Olive Township v. Manchester*, 8 Ohio, 113, that as between two townships, where the equities are equal, a plain and obvious compliance with the requisitions of the law shall be required of those who seek to avoid the obligation.

The plain requisition of the law is, that the *two* overseers shall issue the warrant. In the case before us, it was issued by one, and, of course, was void. It follows that Hiatt has obtained a legal settlement in Williamsburg, and since such settlement was gained, that township must support him.

The case shows, however, that while his legal settlement was in Jackson, expenses were incurred by the township of Williamsburg, in furnishing temporary relief to his wife and son; and that the son, at least, was not in a situation to be removed. Section 9 of the before-cited act provides, "that if any person or persons shall become chargeable, in any *\*township* in which he, [41 she, or they have not gained a legal settlement, it shall be the duty of the overseers of the poor of such township, to cause such person or persons, so soon as the state of his, her, or their health will

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permit, to be removed to the township in which he, she, or they were last legally settled, if such person or persons have any legal settlement within this state." And it is made the duty of the overseers of the poor of the township, to which the removal is made, to receive the pauper, and that township is chargeable with the expense of removal, as well as with the expense previously incurred in affording relief. And if these charges are not paid, the same may be recovered in an action of debt in favor of the trustees of one township, or against the trustees of the other.

This duty of removing the pauper is imperative; and, as a general rule, unless it is done, the township where he has a legal settlement can not be charged. If, however, the pauper is not in a situation to be removed, or, if when the relief is furnished, the place of his legal settlement is unknown, such circumstances will excuse his removal.

The statute makes a difference, too, in cases of temporary and permanent relief; and where the relief is merely temporary it would seem that the removal of the pauper is not absolutely necessary.

In the case before the court, the relief furnished the son of Hiatt was, in fact, permanent; it ended only with his life. But he was not in a situation to be removed. The relief furnished his wife was merely temporary. The overseers of Williamsburg, then, have not been guilty of any neglect which will release the township of Jackson from its liability; and the plaintiffs are entitled to a judgment for the expenses incurred prior to December 25, 1835, at which time the legal settlement of the pauper was changed.

Judgment for the plaintiff.

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42] \*RICHARD DOUGLAS v. CADWALLADER WALLACE, AARON, JOHNSTON, AND JOSEPH BLOOMER.

Where, on a ca. sa., the defendant turns out real estate to release his body, the lien of the judgment on other lands is not thereby discharged.

Equity has no jurisdiction to compel a sheriff to pay over moneys collected on execution.

THIS is a bill in chancery, from the county of Fayette.

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The facts of the case, as they appear in the bill, answer, exhibits, and testimony, are as follows:

At the September term of the court of common pleas of Fayette county, 1818, the defendant, Wallace, recovered a judgment, by confession, against Absalom and Adam Funk, for a debt of \$140 and costs. At the time of the rendition of this judgment, Absalom Funk held, by deed, from Adam Funk, the following lands, lying in Fayette county, to wit: Survey No. 7251, of 150 acres; No. 3708, of 400 acres; and No. 3789, of 176 acres. Wallace levied his execution upon the tract of 150 acres, and purchased it in on May 14, 1825, at \$150, which, deducted from the amount of his judgment, cost, and interest, left a balance of \$76.60 due.

On December 8, 1818, Lingle, Hansberger, and Van Matre, obtained judgment, against Absalom Funk, for \$506.62, and costs of suit. On April 21, 1819, a *ca. sa.* was issued on this judgment, and the defendant, Funk, arrested. To obtain his release, he turned out to the sheriff, survey No. 3708, of 400 acres, which was accepted by the sheriff, and appraised at three dollars per acre.

On July 17, 1823, Absalom Funk conveyed the above survey, No. 3789, of 176 acres, to Adam Funk, and, on the 23d of October, of the succeeding year, Adam Funk conveyed the same to the complainant.

At the March term of the court, 1825, on motion of Lingle, Hansberger, and Van Matre, the appraisalment of the 400 acres was set aside, and another appraisalment ordered. Upon this \*re- [43 appraisalment, the land was valued at \$1.37½ per acre, and thereupon Hansberger, one of the plaintiffs, purchased the 400 acre survey, at the price of about \$367, leaving a large balance due on the judgment.

To collect the balance of his judgment, Wallace took out an execution, and had the same levied on 123½ acres, part of the survey of 176 acres, and, at the same time, an execution was issued in favor of Lingle, Hansberger, and Van Matre, and levied on the same land.

At the sheriff's sale, under these executions, Wallace became the purchaser, on September 30, 1825, for the sum of \$577.50. This amount was sufficient to satisfy the judgment in favor of Wallace, and leave a surplus of \$478.88. It was sufficient to satisfy both judgments, and leave a surplus of about sixty dollars.

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Wallace, at the time of the sale, had become interested in the judgment, in favor of Lingle, Hansberger, and Van Matre. The money arising from the sale was appropriated to the satisfaction of both judgments, and the surplus of sixty dollars was paid over to the defendant, Johnson, who was sheriff of the county at the time of sale, and, by him, was paid over to the defendant, Bloomer, who was his successor in office. After Douglas, in 1823, purchased the survey of 176 acres, he took possession of the same, and sold it to one Green. In 1836, in pursuance of an arrangement made with Douglas, Green effected a settlement with Wallace and received a conveyance from him.

The bill was filed in 1830, and the object and prayer is to compel either of the defendants, who may have the surplus money in hand, to pay it over to the complainant.

DOUGLAS, for the complainant, insisted that he was entitled to the surplus money in this case, the land, from the sale of which the money was made, having been conveyed to him for a full consideration, prior to the sale. He insisted that this surplus amounted to \$478.88; that the sheriff had no right to appropriate any part of this money to the satisfaction of the judgment in favor of 44] Lingle, Hansberger, and Van Matre, that \*judgment having been satisfied by the arrest of Funk, the judgment debtor, in *ca sa*. Ambl. 39; 13 Ves. 193; Wright, 344, 447.

THURMAN and STANBERRY, for the defendant, insisted, that the arrest of the body of a defendant, on a *ca. sa.*, where that arrest was discharged by the surrender of property, real or personal, could not operate as a discharge of the judgment.

HITCHCOCK, J. Two questions seem to be presented to the court, for consideration, in this case:

1. As to the effect of an arrest on *ca. sa.*, where the arrest is discharged by the surrender of property; and,
2. Whether, in a case like the present, a court of chancery can furnish relief.

As to the first question. We are aware that, by the principles of the common law, if a judgment debtor is arrested on a *ca sa.*, such arrest will be considered equivalent to a satisfaction of a judgment. In fact, it is said to be the highest satisfaction known to the law. But there are, and must necessarily be, exceptions to this rule. If the creditor is not permitted to retain his debtor in

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custody, it would hardly do to say, that, by the arrest, his debt was discharged. As if, for instance, a judgment debtor, arrested, is discharged under the insolvent laws, there can be no protense that the judgment is satisfied. If, at any subsequent period, the debtor shall accumulate property, the judgment can be enforced against that property, although it can not be enforced by a second arrest of the body.

By the law in force at the time these proceedings were had, the lands and tenements of the judgment debtor were bound for the satisfaction of the judgment, from the first day of the term of its rendition. The judgment creditor had his election to sue out either a writ of *fi. fa.* or *ca. sa.* If the writ sued out was a *fi. fa.*, it was levied upon the personal or real property of the defendants. If a *ca. sa.*, the body of the defendant must be taken. But it was provided, "That any person taken by a writ of *capias ad satisfaciendum* shall be discharged, by \*delivering, or setting [45 off, to the officer serving the same, real or personal property sufficient to satisfy the judgment and costs for which said writ issued." And the same act provided that, if a defendant should *die in execution*, the creditor might afterward sue out execution against his goods or lands. 2 Chase's L. 1303. The property delivered or set off by a debtor, to procure his discharge from arrest must be sold in the same manner as if the same had been levied on by a *fi. fa.* Under these circumstances, we can not suppose that the lien of the judgment was discharged, because the form of the writ was that of a *ca. sa.*, unless it would have been discharged by the levy of a *fi. fa.* upon the same property. The effect of the levy, in either case, would be the same; and why should not the consequences be the same? In the opinion of the court, the judgment of Lingle, Hansberger, and Van Matre continued to be a lien upon the land of Funk, the judgment debtor, and the avails of the sale of that land were well appropriated to satisfy that judgment.

But there is still a balance of about sixty dollars remaining, and the complainant insists that he is entitled to a decree for this amount; and this claim raises the question whether a court of equity can, with propriety, give relief in a case like the present. Courts of chancery have jurisdiction in those cases in which plain, adequate, and complete remedy can not be had at law. If, in a case like the present, a court of law could not relieve, a court of

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chancery may. By the law regulating judgments and executions, it is made the duty of the sheriff, or other officer making sale of land, or other property, on execution, if there be a surplus of money after satisfying the execution, to pay the same over to the judgment debtor, or his legal representative, on demand. If payment is refused, an action of law will lie against the officer, at the suit of the judgment debtor, to receive this surplus, or the statute confers upon him the same right to move the court to amerce the officer, as is conferred upon the judgment creditor. The remedy at law is plain, complete, adequate.

46] \*In the present case, however, Funk was the judgment debtor, and, by the letter of the law, would be entitled to the surplus. The complainant claims, however, that, having purchased the land of Funk previous to the sheriff's sale, he is justly entitled to this surplus. There is, certainly, an appearance of equity in this claim; but the question as to whether the complainant or Funk has a right to this surplus is one with which these defendants have nothing to do—a question in which they have no interest. Wallace, as he was bound to do, has paid it over to sheriff Johnson, and Johnson has paid it over to his successor. It belongs either to Funk or Douglas. But Funk, who has the only interest opposed to Douglas, is not a party to this suit. But even if Funk were a party, we apprehend it could make no difference. The court to whom the execution was returned might, with propriety, on motion, determine this question of right.

The bill must be dismissed, with costs.

Bill dismissed.

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THE STATE OF OHIO, ON THE RELATION OF ELISHA P. PETERS, v.  
CHARLES MCCOLLISTER.

Under the act of February 14, 1840, the same individual may hold, at the same time, the offices of associate judge and county treasurer.

THIS is an information, in the nature of a *quo warranto*, from the county of Pike.

The case is as follows :

On November 29, 1840, the prosecuting attorney of the county

of Pike, on the relation of Elisha P. Peters, by leave of the court, filed an information, in the nature of a *quo warranto*, against the defendant, Charles McCollister. This \*information contains [47 eight several counts. In the four first it is charged, in substance, that on April 4, 1840, the defendant, being treasurer of the county of Pike, unlawfully usurped the office of associate judge of the court of common pleas of said county, of neither of which offices was he an incumbent on February 15, 1840; and that the said defendant, from the said 4th day of April to the time of filing the information, had continued to hold and perform the duties and receive the emoluments of both of said offices of associate judge and county treasurer, contrary to the form of the statute in such case made and provided.

In the four last counts, it is charged that the defendant, on June 1, 1840, at Pike county aforesaid, then and there being an associate judge of the court of common pleas of said county, and receiving the emoluments appertaining to said office, did then and there unlawfully usurp the office of county treasurer of the county of Pike aforesaid, the same being a public office, of which said office he, the said defendant, thenceforward held, and still continues to hold, exercise, and discharge the duties, and receive emoluments appertaining to the same, of neither of which offices was he an incumbent on February 15, 1840, contrary to the form of the statute, etc.

To this information the defendant has filed two pleas.

In the first, it is stated that on October 8, 1839, the defendant was duly and legally elected treasurer of the county of Pike, for the term of two years from the first day of June then next; that he received a certificate of his election within the time required by statute; and that, on June 2, 1840, he gave bond, and took the oaths required by law, to discharge the duties of said office. That, on February 6, 1840, he was elected by the general assembly of said State of Ohio, to be an associate judge of the court of common pleas of said county of Pike; on the 24th day of March of the same year, he was commissioned as judge as aforesaid, by the governor of the state, for the term of seven years, from the 48] twenty-third day of the same month; \*and that, on the 4th day of April thereafter, he took the oaths of office, and caused the same to be indorsed on his commission.

The second plea does not vary materially from the first.

To these pleas there is a general demurrer.

SCOTT & TAYLOR, for the relator, contended that, under the law of February 14, 1840, "prohibiting any citizen of this state from holding, by appointment, more than one of the several offices therein named," the two offices of associate judge and county treasurer were incompatible; and that no person could hold both offices at the same time; that this law must receive the same construction that it would have done had the words, "*by appointment*," not have been contained within it; and that the intention of the legislature could not be carried out unless it was so construed. If it be an evil for any person to hold two of the offices named in the law, the evil is the same, whether that person holds by appointment or by election.

They further contended that the defendant was not within the proviso of the statute; for, although he had been elected to both offices previous to the passage of the law, still he had not qualified under either, and, of course, was not, within the meaning of the statute, an "*incumbent*" of either.

THURMAN & BYINGTON, for the defendant, contradicted this position. They insisted that the defendant was within the proviso. That having been elected, in October, 1839, treasurer of the county, and having received a certificate of that election, he was, from the time, an incumbent of the office. So, having been elected an associate judge, he had a constitutional right to that office, of which the legislature could not, by subsequent legislation, deprive him.

They further contended that the general assembly did not, by the law, intend to deprive a person from holding two of the enumerated offices, if *elected* thereto. That the object was to prohibit the *appointment* of an individual to one of these offices, provided he held, at the same time, another by like appointment. They enforced these views by a variety of arguments, and also by reference to the journal of the senate of the state, during the time this law was under consideration.

HITCHCOCK, J. This information is filed upon the supposition that there is an incompatibility between the offices of associate judge and county treasurer; and that the same person can not, consistently with law, hold both of said offices at the same time. The only difficulty in the case grows out of an act of the general



assembly of the state, passed on February 14, 1840; which provides, "that no citizen of this state shall hold, *by appointment*, at the same time, or for the same period of time, more than one of the offices hereinafter mentioned, to wit, the office of sheriff, county auditor, county treasurer, county assessor, clerk of the court of common pleas, county recorder, and associate judge; and no justice of the peace shall hold the office of associate judge; provided, that nothing herein contained shall be applicable to present incumbents of two or more official stations, until their term of office shall expire."

The defendant filed two of said offices at the same time. But it is claimed for him, by his counsel, that he has a right so to fill them, because:

1. He was an incumbent of both offices at the time of the enactment of the law, and is within the proviso.

2. He fills both offices *by election*, not *by appointment*.

Let us inquire, then, in the first place, whether the defendant is within the proviso, which prescribes, "that nothing herein contained shall be applicable to *present incumbents* of two or more official stations, until their term of office shall expire." This question is settled, if we can ascertain what meaning is to be attached to the word "*incumbent*" as applied to an office; in other words, if we can ascertain at what time an individual becomes an *incumbent* in an office. The defendant was elected county treasurer on October 8, 1839, and associate judge on February 6, 1840. This law was enacted \*on February 14, 1840. If the elections [50 constituted him an *incumbent* of the offices to which he was elected (and this is the ground taken by the defendant's counsel), then he is within the proviso. I concur with the counsel for the defendant, that the legislature have no power, by retrospective legislation, to deprive a man of an office. When a man becomes an incumbent of an office, he has a vested right in that office; and all such rights are secured by the constitution. An act which would attempt to deprive him of this right would savor more of despotism than of constitutional legislation. The legislature may prescribe rules, prospectively, by which he shall be controlled; and these he is bound to obey. But to oust him from office by *direct* legislation can not be done.

But I can not concur with counsel, that a man appointed or elected to an office, thereby becomes an "*incumbent*" of that of-

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office. An incumbent of an office is one who is legally authorized to discharge the duties of that office. For instance, a man who is elected county treasurer is required to give bonds and take an oath of office. Now, these things must be done before he can discharge the duties of the office; and if not done in due time, the office itself is vacant. There is no incumbent. So, where a man is elected judge, he does not, by the election, become a judge. He must receive a commission, as evidence of his authority to act; must take an oath of office, and have it indorsed on his commission. When this is done, and not before, he is an "incumbent" of the office. *State v. Moffit*, 5 Ohio, 358. By giving to the phrase a different meaning, we should not only involve ourselves in difficulty, but should condemn the practice of the general assembly from the first organization of the state government. It has been the uniform practice of that body, when the appointment of an officer was vested in it, and it was known that a vacancy would occur, either during the session, or within a short period thereafter, to make an appointment, or election, to fill such vacancy before it had actually occurred. This has been found to be convenient, and the practice has been universally acquiesced in. But upon the theory of defendant's counsel, this practice would be palpably in violation of the constitution of the state. The number of judges of the Supreme Court is limited to four. It is known to the general assembly, in session, that a vacancy will occur in this court by the expiration of the term of office of one of its members, either during its present session, or prior to the next succeeding session of that body, and they proceed to fill this prospective vacancy. If the election constitutes an incumbency in office, we shall have five judges, instead of four; unless, which will hardly be contended, there can be more incumbents of office than offices. The effect of the election is to give the individual elected a right to the office, so soon as the vacancy shall occur. Of this right the legislature can not deprive him; nor can the governor withhold from him a commission, without a gross violation of executive duty.

Again, the law prescribing the duties of county treasurers prescribes that an individual elected to this office "shall hold his office for two years from the first Monday of June next succeeding his election." The defendant was elected to this office in October, 1837. His term of office commenced on the first Monday

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of June next thereafter. Did he become an incumbent of the office before his term of office commenced?

In the opinion of the court, the defendant did not become an incumbent of the office of associate judge until April 4, 1840, when he took the oath of office; nor of the office of county treasurer until the 2d day of June of the same year, on which day he took the oath of office, and on which day his term of office commenced; and consequently he is not protected by the proviso of the act of February 14, 1840, already cited.

The next ground of defense assumed by defendant's counsel is, that he holds these two offices, not by appointment, but by election.

There is more difficulty in disposing of this part of the defense, and this difficulty grows out of the phraseology of the act: "No citizen of this state shall hold, *by appointment*," etc. \*This [52 word, *appointment*, is not used carelessly or inconsiderately, as is apparent from the fact, that this same word is used in the title. It is styled "an act prohibiting any citizen of this state from holding, *by appointment*," etc. What, then, is meant by the word *appointment*, as here used?

In this state we have no such thing as hereditary office. Every officer derives his power to execute the duties of his office from some law of the state, defining the duties to be discharged in the particular office, and from having that office conferred on him by some superior power, authorized to confer it. The constitution of the state contemplates two different modes of conferring office. One is by appointment, the other by election. And a careful examination will show, that whenever the office is to be conferred by the people, or by any considerable body of the people, it is spoken of as *an election*. Whenever it is to be conferred by an individual, as by the governor, or by a select number of individuals, as by a judicial court, or by the general assembly, it is spoken of as *an appointment*. Thus, in the first section of the first article of the constitution, it is said "the legislative authority of this state shall be vested in a general assembly, which shall consist of a senate and house of representatives, both to be *elected* by the people." So, in the second article of the same instrument, "the supreme executive power of this state shall be vested in a governor;" and he shall be *chosen* by the electors of the members of the general assembly." "A secretary of state shall be *appointed*

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by a joint ballot of the senate and house of representatives." Sec. 16, art. 2. "The judges of the supreme court, the president and associate judges of the court of common pleas, shall be *appointed* by joint ballot of both houses of the general assembly." Art. 3, sec. 7. "Each court shall *appoint its own clerk*" Art. 3, sec. 9. "A competent number of justices of the peace shall be *elected* by the qualified electors in each township." Art. 3, sec. 10. "Captains and subalterns in the militia shall be *elected* by those persons, in their respective company districts, subject to military duty. Majors shall be *elected* by the captains 53] and subalterns \*of the battalion. Colonels shall be *elected* by the majors, captains, and subalterns of the regiment. Brigadier-generals shall be *elected* by the commissioned officers of their respective brigades. Major-generals and quartermaster-generals shall be *appointed by joint ballot* of both houses of the legislature. The governor shall *appoint* the adjutant-general. The major-generals shall *appoint* their aids," etc. Art. 5, secs. 1-6. "There shall be *elected*, in each county, one sheriff and one coroner, by the citizens thereof." "The state treasurer and auditor shall be *appointed* by joint ballot of both houses of the legislature." "Town and township officers shall be *chosen* annually, by the inhabitants thereof, duly qualified to vote for members of the general assembly." Art. 6, secs. 1-3.

It is true that in a certain, and perhaps in the most general sense of the term, every person upon whom an office is conferred may be said to hold that office by appointment, whether the appointment be made by an individual or individuals having power to make, or by the election of a more numerous body. And it is equally true that the same person may be said to have been elected to the office, as he fills it in pursuance of choice, whether that choice has been made by one or more. But the framers of the constitution unquestionably understood that there was a difference in filling an office by *appointment* and by *election*. And where either of these words are used in a statute law under that constitution, this court ought not, unless for strong and powerful reasons, to give to the word a different meaning from that which it plainly imparts, as used in that instrument. In common parlance, we know that there is a different meaning attached to the words appoint, and elect, as applied to officers.

Since we find that there is this distinction made in the constitu-

tion, and in common parlance, is it reasonable to suppose that the legislature had not this distinction in view when this law was enacted? "No citizen of this state shall hold *by appointment*, at the same period of time, more than one of the offices hereinafter mentioned, to wit, the office of sheriff, \*county auditor, county [54] treasurer, county assessor, clerk of the court of common pleas, county recorder, and associate judge." If it was intended to render it absolutely incompatible for any person to hold two of these offices, why not say so at once? Why use these words, "*by appointment*?" Had these words been omitted, the intention would have been clear and obvious. And this was well understood by the body enacting the law. In the same section they do make two particular offices incompatible, and they do it in language not to be misunderstood. Immediately after the words last cited, it is added "and no justice of the peace shall hold the office of an associate judge."

That the legislature intended this law to apply only to such persons as might hold their offices *by appointment*, according to the common acceptance of the term, is inferable from the fact that, with the exception of the office of clerk of the court of common pleas, the offices named in the first number of the section are sometimes filled by election, sometimes by appointment. The office of clerk is always filled by appointment of the court, according to the provisions of the constitution. The other offices are those of sheriff, county auditor, county treasurer, county assessor, county recorder, and associate judge. This last office is, according to the terms of the constitution, filled by appointment of the general assembly. According to common parlance it is filled by election. But sheriffs, county auditors, county treasurers, county assessors, and county recorders are elected by the electors of their respective county. The law prescribes that they shall be *electel*. By the act of February 17, 1831, "for the appointment of certain officers therein named," it is provided, "that whenever the office of sheriff and coroner, in any county, shall become vacant, the court of common pleas of such county, or the associate judges thereof, may *appoint* some suitable person to perform the duties of sheriff until the next annual election." So, when a vacancy shall happen in the office of county auditor, the commissioners of the county are required to *appoint* some suitable person to fill the vacancy. \*So, if a [55] vacancy happen in the office of county treasurer, the county commissioners are required to *appoint* some person to fill the vacancy.

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The same is the case with respect to the county assessor and county recorder. 29 Ohio L. 271. And if the office of associate judge is considered as elective, if a vacancy happen during the recess of the legislature, the governor is authorized to *appoint* to fill the vacancy. All the officers thus *appointed*, are required to take the same oaths, and to give the same security, as are those elected by the people.

Such being the law, these offices being filled as expressed in that law, sometimes by election, sometimes by appointment, can it be believed that the legislature introduced this word "*appointment*" into the statute under consideration without design, without any definite object; that they intended it should be rejected in giving a construction to this act? It seems to us not.

But if there could be any doubt as to the intention of that body, that doubt would be removed upon looking into the journals of their proceedings. As this bill, which afterward became a law, originally passed through the house of representatives, it was in this form: "No citizen of this state shall hold, by election, appointment, or otherwise," etc. But it was amended in the senate by striking out the words "*election*" and "*otherwise*," leaving it as it now stands upon the statute book. Senate Journal, 1839-40, pp. 321, 322. Now, these words *alone* could not have been stricken out, because unnecessary, if the intention was to make the offices incompatible, no matter how conferred. If this had been intended, the word "*appointment*" would also have been included. The evident intention of this amendment was to restrict, not to extend, the operation of the law. I am aware that every statute should speak for itself, and be construed by itself; but if there be doubt as to its construction, resort may be had to extraneous matters, and nothing of this kind is more satisfactory than the journals of the body by which it was enacted.

It is said, however, that by giving to the act this construction, it will not tend to remove the evils intended to be removed. \*If we knew where these evils were, perhaps we should be convinced of the truth of this position. But, for myself, I do not know, nor have I heard that any great evils were experienced from the law as it existed before the passage of this act. There would seem, it is true, to be an impropriety in permitting the same individual to hold the offices of sheriff and clerk, or of county treasurer and county auditor. But it is not perceived that

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any great public inconvenience could result from vesting the offices of clerk of the court and recorder of the county, or of county auditor and county recorder, in the same person.

If, however, it be an evil, and it was the intention of the legislature to apply a remedy, it is unfortunate that the remedy applied, should not have been co-extensive with that evil. But if they have not done it by the terms of their act, we can not do it by construction. If it be an evil that a person who holds the office of county treasurer should hold the office of associate judge by a temporary appointment, we do not see that the evil would be diminished by his holding the same office by election for seven years; and so, on the other hand, if a man holds the office of associate judge, and community would sustain an injury by his holding the office of county treasurer for three months, we do not see that the injury would be lessened by his holding the same office for two years. Yet, to our apprehension, the legislature have prohibited the one, but have not the other. There is an apparent incongruity in the law, but we, as a court, do not feel ourselves authorized to depart from what we conceive to be its obvious intent and meaning.

Such being the opinion of the court, it follows that the defendant, holding these two offices by election, not by appointment, is not within the prohibition of this statute, and that his pleas are sufficient in law to bar this prosecution against him, and judgment will be entered accordingly. Judgment for the defendant.

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\*M. S. WADE v. M. D. PETTIBONE.

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The creditor in an execution may claim the benefit of a purchase made by his attorney, especially if the whole debt is not paid. But he must assert his right in a reasonable time.

THIS is a bill in chancery from the county of Delaware.

In 1835, the Miami Exporting Company having been, for many years, a suspended institution, and being about to recommence business, made certain dispositions of their then existing debts, for the benefit of their old stockholders. By a resolution of

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July 13, 1835, they divided their debts into classes, rating them after the probability of making collections; and, on the fourth class, which they called "*desperate*," they authorized their agent to retain, as a compensation, fifty per centum on the amount collected. They appointed the plaintiff their agent, and authorized the president to convey to him, in *trust* for the stockholders, all the property, of every description, owned by the institution.

Some time in 1835 or 1836, the plaintiff employed the defendant, who is a solicitor in chancery, to bring a suit to foreclose a mortgage, in Delaware county, against the heirs of James Keys, one-third of which belonged to the Bank of the United States, and the two-thirds to the Miami Exporting Company. The suit was duly prosecuted, and the land advertised for sale on October 3, 1836.

On September 7, 1836, about four weeks before the sale, Pettibone wrote a letter to Wade, advising him that the land had been appraised by the master, and of the time of sale, and inquiring if he should bid it in for the company, if it should sell for less than the appraisement. No answer to this letter was received at the time of the sale, and Pettibone attended, and bid it in, in his own name. On the 11th of October, eight days after the purchase, Wade wrote to Pettibone instructions to purchase the property.

58] \*On November 29, 1836, Pettibone again wrote to Wade, reciting the sale and his purchase; as he inferred, from his receiving no answer to his letter, that the company did not wish to purchase, but that, since his letter had been mislaid, he was now willing to relinquish his purchase to the company, and would release when he acquired a title from the master. He offered, however, to take it at the appraisement, and if they deemed it best to retain it, he would convey all his interest as soon as he got his deed.

On the 9th of December, Wade replied to this proposition, that Pettibone might retain the land at two dollars per acre, and if he did not accept it on these terms he directed the deed to be made to M. S. Wade, trustee and agent of the Miami Exporting Company.

Pettibone, on the 27th of December, by another letter, renewed his offer to purchase; to pay \$1,200 on certain payments, and re-



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peating, if these terms were not accepted, to forward to Wade a deed, if he preferred it, on the return of the master.

Wade answered this letter on the 10th of April; declines setting a price upon the land until he sees it, and expects "*to be up*" (to Delaware) some time in May, and offers the preference to Pettibone if he concludes to sell.

No further communication was had between these parties until August, 1839, a period of two years and four months. In the spring of 1839, the master pressed Pettibone for adjustment of the purchase money. In June, 1839, Pettibone visited Cincinnati, the residence of the plaintiff, and he says, in his answer, he sought him and could not find him. He then paid into the office of the company, the purchase money, \$650.89, after deducting the master's costs and his own fees, and thenceforth claimed the land as his own.

POWELL, for the plaintiff, insisted upon a decree, on two grounds:

1. That the correspondence between the parties created a contract, which ought to be specifically enforced; and,

\*2. That the defendant was the agent and solicitor of the [59] plaintiff, and stood, therefore, in such a fiduciary relation as to preclude him from becoming a purchaser.

On the last point he cited *Armstrong v. Huston*, 8 Ohio, 554; 1 Mad. Ch. 112, 114; 1 Fonb. Eq. 135; 1 Story Eq. 249, 260; *Campbell v. Walker*, 13 Ves. 601; *Morse v. Royal*, 12 Ves. 372; *Ex parte Lacy*, 6 Ves. 625; *Davoue v. Fanning*, 2 Johns. Ch. 257; *Hawley v. Mancius*, 7 Johns. 188; *Ex parte James*, 8 Ves. 345; *Ex parte Bennett*, 10 Ves. 381; *Ex parte Wiggins*, 1 Hill Ch. (S. C.) 356; *Howell v. Baker*, 4 Johns. Ch. 119, *Blight v. Tobin*, 7 Mon. 616; *Leisenring v. Black*, 5 Watts, 303; *Owen v. Foulkes*, 6 Ves. 630; *Hall v. Hallet*, 1 Cox, 134. Nor will the fact that the sale was a fair one protect the purchaser. *Campbell v. Walker*, 13 Ves. 601; *Ex parte Lacy*, 6 Ves. 625, 630; *Davoue v. Fanning*, 2 Johns. Ch. 257.

FINCH, for the defendant, claimed that the rule laid down in the cases cited did not apply to attorneys at law, but to agents and trustees only. *Beardsley v. Root*, 11 Johns. 464.

LANE, C. J. The ground upon which the defendant claims the right to withdraw his offer to relinquish his title to the land is because, he says, that offer was made *to the company*, but that he has

discovered Wade claims the title as his own, and not for the benefit of the company. Much of the argument is devoted to the examination of the proofs bearing on this point. It will be unnecessary for us to notice this, because, in our opinion, the case will be decided upon principles, among which this loses its character and importance.

Pursuing the facts in the order of their occurrence, the first proposition to be considered is, whether the attorney or solicitor can purchase, at a sale under the execution which his client is seeking to enforce; as between him and the debtor, as between him and third persons, such sale is without objection, but it is another question between him and his client, when the law creates confidential relations. The attorney is retained for the purpose [60] of doing all in his power to advance \*the client's interests, and, especially, that the property should produce enough, by sale, to pay the whole debt. For this purpose, although not the agent of the law in making sales, he has a large control as to the management of the execution. Without adverting to other means of influence, he can select his time to set the machinery of the law in motion, and he can countermand or postpone it for the purpose of obtaining for his client a better price. But if he were permitted to purchase, it would be his interest to buy at the least price; his personal interest, therefore, would be adverse to that of his client, especially if the property did not produce enough to pay the whole debt. He would be enabled to gain by sacrificing his client's interest, and the lower the price, the greater would be his advantage, and the greater his client's loss. To prevent this collision of interests, to destroy the temptation of abusing opportunities for obtaining personal advantages, at the expense of confidential obligations, by sacrificing interests which he is bound to protect, the law imposes upon those who stand in fiduciary relations the disability of acquiring interests inconsistent with such relation. It does not inquire whether the act was honest or advantageous, but gives the protected party all advantage of the act done. This doctrine is universally applicable to trustees, executors, agents, and it nowhere is of more forcible application than to an attorney purchasing under an execution, where the whole debt is not paid. 8 Ohio, 552; 9 Ohio, 117; 5 Watts, 303.

The case, then, is one in which, although Pettibone acted in entire good faith, his client may step in and claim the benefit of his

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purchase, unless it was made with their assent. He claims that assent may be inferred, after they did not answer the letter in which he communicated information about the sale, and asked their instructions. We do not intend to determine whether such assent can be presumed from this omission. And it is of no consequence in the present case, because, by his letter of the 29th of November, he cheerfully relinquished all benefit of the purchase to the company. This act was a recognition of his confidential relations; and it authorized the company or Wade, their trustee (whom, on this examination, we at present regard as identical with the company), to demand of Pettibone to hold his rights for their benefit, and to be substituted in his place. Negotiations were then opened between the parties for the sale of the land, which continued until April, 1837, when Wade signified his intention to be in Delaware, to mature the arrangement, during the ensuing month. Up to this time the rights of the parties were clear; and had an application been then made, we should have found no difficulty of entertaining a suit to give the title to the plaintiff. [61

But, before Wade, or the company, could claim the benefit of this purchase, it is plain they must absolve Pettibone from his responsibilities and pay the expenses of acquiring the title. Pettibone had a claim for his own fees. He was responsible to the master for the expenses of the sale, and he stood liable to the master for the immediate adjustment of the purchase money, for, although Wade might elect to assume the purchase, it is not clear that Pettibone could, even then, compel them to take it, and certainly not without litigation, in which the master ought not to be involved. In this stage of the case, Pettibone had a right to expect of the plaintiff an early close of the affair.

Instead of this, not a step was taken, or a movement made, toward the completion of the purchase, from April, 1837, to June, 1839. During this period of twenty-five months, no effort was made, either to pay to Pettibone his just claim, or to release him from his responsibilities to the master. And if we may trust the answer, when, in the spring of 1839, the master had exacted, from Pettibone, security for the prompt payment of the purchase money, and when Pettibone visited Cincinnati, in June, 1839, on this errand, but the plaintiff could not be found. He, therefore, paid the money over to the company.

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The phase, therefore, which the case assumes, is not as to the existence of the original right, but whether it has not been \*lost by delay. This long slumber, this unaccountable and inexcusable neglect of duties, seems, to the court, a sufficient answer to a plaintiff who is seeking, in chancery, to assert rights.

Bill dismissed.

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MICAJAH T. WILLIAMS v. BOSSON & BROTHERS.

The indorsers of an accommodation bill are not joint sureties, but are liable to each other in the order of their becoming parties.

THIS is a writ of error to the Supreme Court of the county of Miami.

It brings up the following case by a bill of exceptions:

The action was upon a bill of exchange, for \$3,000, drawn by Green, upon Bosson & Brothers, to the order of Dana, and indorsed by Dana to the plaintiff, Williams, dated September 16, 1838, payable in ten months, and accepted.

The defendants proved, that before this time they had accepted, for Green's accommodation, a draft in favor of Lawrence, due in September, 1838, and that the present draft was made and placed in Green's hands to obtain a renewal of the Lawrence draft, but that it was not used for this purpose.

That another bill, for Green's accommodation, drawn by him, to the order of Dana, and indorsed by the present plaintiff, Williams, payable April 18, 1839, was negotiated at the Commercial Bank. That when that fell due, the present draft, thus remaining in Green's hands, was used by him to raise money to pay the Dana draft, and that, for this purpose, the blanks were filled by Green, and indorsed by Dana and Williams. The present bill was not paid at maturity, and remained under protest until December, 1839, when it was paid by \*funds raised upon another loan, made on a bill drawn by Green on the defendants, indorsed by Dana and Williams, but not accepted.

These facts show three drafts had passed between the parties. The first was the Lawrence draft; the second is the draft now in

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suit, intended by the acceptors to renew the Lawrence draft, but used to renew the Dana draft; the third is the one drawn by Green on them, and not accepted.

The second draft was taken up by the bank, and came to the hands of Williams in the following manner: It lay in the bank, under protest, some time. Bill, No. 3, was drawn by Green to Dana, and indorsed by him and Williams, and negotiated at the Commercial Bank. Williams being the last indorser, the money was placed to his credit, and could be drawn only by his check. Dana, at the request of Green, then took up the bill, by means of Williams' check, and retained it. Some time after, Williams endeavored to persuade Dana to join in prosecuting the defendants on the present draft, but Dana declined, because he thought the negligence of the notary had exonerated him. Williams then procured the bill, for the purpose, as he said, of seeing if he was not released also, and has commenced this suit upon it.

The court instructed the jury as follows:

1. That if there was a misapplication of the bill by Green, with the knowledge of Williams, it is a defense to this suit; but this misapplication must be proved by defendants.

2. Joseph Bosson, one of the firm of Bosson & Brothers, having died while bill No. 2 lay, unused, in the hands of Green, such death, and Williams' knowledge of such death, would not impair his rights as holder, he being ignorant of such misapplication.

3. That the rule in *Douglass v. Waddle*, 1 Ohio, 413, applies to notes only, and not to bills, although accommodation bills.

4. That the circumstances of the payment of draft No. 2, by Williams' check, and his possession of the draft, are *prima facie* evidence of payment by him.

\*5. They declined to charge that possession being obtained [64 by Williams, under the above circumstances, the same equitable defenses would prevail in this suit as if it was brought by Green.

The jury returned a verdict for the plaintiff.

R. S. HART, for the plaintiff in error, insisted that the court erred in their charge to the jury. He cited 2 Stark. Ev. 153, 180; Chit. on Bills, 255, 241, 243, 554, 335, 53, 60, 256, note G.

C. L. TELFORD, on the same side, cited 3 Kent Com. 79; Bay v. Coddington, 5 Johns. Ch. 56; Gill v. Cubit, 3 Barn. & Cress. 466; Riley and Van Amringe v. Johnson, 8 Ohio, 526; Coddington v.

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Bay, 637; *Evans v. Smith*, 4 Binn. 367; *De la Chaumette v. The Bank of England*, 9 Barn. & Cress. 208, 17 Eng. Com. Law, 356; *Lowndes v. Anderson*, 13 East, 135; *Wardell v. Howell*, 9 Wend. 170; *Denniston v. Bacon*, 10 Johns. 198; *Woodhull v. Holmes*, 10 Johns. 231; *Collins v. Martin*, 1 Bos. & Pul. 648.

ODLIN, SCHENCK & HOWARD, for the defendant in error, sustaining the charge of the court, cited *Byles on Bills*, 63; 2 Stark. Ev. 166; *Crook v. Jadis*, 5 Barn. & Adol. 1106, S. C., 27; Eng. Com. Law, 234, 278; *McDonald v. McGruder*, 3 Pet. 470; *Adams v. McMillen*, 7 Porter, 73; *Bank of United States v. Dunn*, 6 Pet. 51; *Matthews v. Hall*, 1 Vt. 316; *Chitty on Bills*, 255, 9 ed.

LANE, C. J. The propriety of the court's refusing to hold the bill liable to all equities which might be set up against Green, depends upon the following proposition:

That Green could never set up the note, it having been given for his accommodation; that Williams did not acquire the note in the common course of business, as a purchaser, for a consideration passing at the time, but that it was a paper whose obligation was 65] extinct, because it had done its office; and having \*been taken as security for a prior debt, and under circumstances calculated to awaken suspicion, such as the death of Joseph Bosson, the embarrassments of Green, the long time of credit on the face of the bill, and the period since its date in which it had remained unemployed in Green's hands; and the case of *Riley and Van Amringe v. Johnson*, 8 Ohio, 526, is relied on to sustain the position.

The justice of this view depends on assuming that Williams acquired his right to the paper in suit, after it was due, by the transfer from Dana, and as collateral security for his liabilities for Green. Upon this assumed fact, the case referred to might apply, and as the authority of that decision is questioned, it might be necessary for the court to examine its grounds. But the facts do not justify the defendant in this position. Although Williams has said he held it as such security, he is not concluded by an inadvertent admission, if he really possesses other rights. He did not take the paper by any new assignment from Dana, or derive any rights to it from Green, after its dishonor; but he was one of the series of indorsers upon it, and if he paid the debt, he created

or retained a right to it as his own, to enable him to pursue his remedy against its earlier parties. He holds it, therefore, not as a purchaser of a dishonored security, but as the indorser of a bill not due; and his rights are referable to the time of his indorsement, not to the time when he took the note from Dana. It was, then, not wrong for the court to decline instructing the jury that the possession of the bill acquired from Dana, under the pretense of inquiring into his liabilities, conferred no right of action.

The other considerations to which the defendants allude, were entirely proper to be laid before the jury. The bill was not applied by Green to the purpose for which it was intended; and such misapplication, if proved to have been made with the knowledge of Williams, would involve him in all the consequences attaching to Green. *Stone v. Vance et al.*, 6 Ohio, 246. To this end the suspicious circumstances were the subjects of animadversion and comment to establish notice. But it is plainly not law to hold the indorser of paper, \*not due, responsible for a mis- [66] use to which he is not privy, except in such cases as gaming notes, or those void by statute. The death of William Bosson, one of the partners of the firm whose surviving members are sued, does not invalidate the paper. It was accepted before, and, at the time of his death, was in the possession of Green. It received its form and vitality before his death, and no act of any member of the firm is necessary to add anything to it.

The opinion expressed by the court, that the facts shown in the depositions of Dana, Outcalt, and Hall are *prima facie* evidence of a payment by Williams, is claimed to be not sustainable. The necessity of this proof of payment, in the *first instance*, is not perceived; because the holder of a bill is entitled to a suit, unless some circumstances exist to render his title suspicious. Yet if the bill was taken up by Green, an *earlier* party, no right of action would accrue to Williams. The bill in suit was, in fact, regained from the Commercial Bank by means of money, acquired by the discount of another, drawn by Green on the Bossons, indorsed by Dana and Williams. The money raised on the loan was placed to Williams' sole account, and was paid over on the bill in suit on his check. It was, therefore, apparently Williams' money; and if the bill were a real transaction, this would be complete proof. It was still competent for the defendants to show the money, in fact, belonged to Green, but the evidence makes no such

proof. At the maturity of the second bill, the indorsers were under the necessity of providing for its payment. Their arrangements, among themselves, were of no moment to the defendants; and none of their remedies against the acceptors are taken away, if they received money by means of Green's draft, and complied with their own responsibility, unless Green paid it; and the facts, instead of showing this, make it probable that the payment of the third draft is fastened upon Williams, from Green's insolvency, and from the discharge of Dana, through the omission of the notary.

But the principle most relied on, as erroneous in this charge, is that which regards the rule of a former decision of this 67] \*court, not applicable to bills of exchange. In the case of *Douglass v. Waddle*, 1 Ohio, 413, it is held that in accommodation notes, the foundation of loans from banks, the several parties whose names are used for the benefit of the person for whom the loans are made, are presumed to be joint securities only, and each can recover from the other, whether maker or indorser, his proportion only. That decision was made in 1824, and the liability of the parties occurred at a still earlier period. At that time the form of obtaining accommodations from banks was on notes only; upon such notes a local usage obtained, holding the sureties on each paper as joint securities only, and not liable to each other in the order of their coming upon the notes. It is this local rule which is recognized and established as law by the authority of that case.

In the law of real property, each state has its local rules, and its own courts are competent to establish and maintain them. But in the law of contracts, especially in mercantile contracts, the principles are nearly uniform throughout the civilized world; they are established by a wider experience, and are maintained in a greater uniformity, in consequence of the great number of tribunals through whom they are expressed. Our state has become, and is becoming, the scene of large commercial operations, and it is of much moment that the principles on which justice is administered should be made to conform, as far as possible, to the general law merchant. The intrinsic propriety of this step is increased by remembering that the foreigner will find the general law merchant governing the tribunal which sits by our side, and will obtain there a different rule of justice than our own citizen. The intro-



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duction of bills, as a basis of bank accommodation, has taken place long since the decision of *Douglass v. Waddle*. They are of mercantile origin, and the law merchant should govern their use. The right of the indorsee to hold all earlier parties responsible to him, is undoubted; and it is plainly our duty to follow these rules, unless bound by our own precedents. But we see no reason to extend the rules of *Douglass v. Waddle* beyond the kind of paper to which *local* usage had applied it; and it is \*sufficient [68 evidence that the parties, by adopting paper of a different form, did not rely on its protection. This step has heretofore been taken on the circuit. *Walker v. Worthington*, Ross Supreme Court, 1835. And the court unite in the opinion that the judge committed no error. Judgment affirmed.

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## NOAH LOUGEE v. THE STATE OF OHIO.

Under the act of January 16, 1816, "to prohibit the issuing and circulating unauthorized bank paper," it is sufficient to charge, in the indictment, in general terms, that the defendant acted as an officer of a bank not incorporated by law.

An order that the defendant stand committed until fine and costs be paid, is erroneous.

The judgment of the court of common pleas, in a criminal case, may be reversed in part, and affirmed in part.

THIS is a writ of error to the court of common pleas of Hamilton county.

The record shows that the plaintiff in error, at the March term of the court of common pleas of said county, 1840, was indicted for a violation of the statute law of this state, "to prohibit the issuing and circulating of unauthorized bank paper." The indictment contains several counts; and, on trial at the July term of the same court, in the same year, he was found guilty, by the jury, as charged in the second count of the indictment, and not guilty, as charged in the other counts.

This second count of the indictment is in these words: "And the jurors aforesaid, on their oaths, do further present, that the said Noah Lougee, on March 1, 1840, with force and arms, in the

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county aforesaid, acted as an officer of a bank not incorporated by law, contrary to the statute in such case made and provided, and against the peace and dignity of the State of Ohio."

69] \*Upon the finding of the jury the court sentenced the defendant, Loungee, to pay a fine of \$1,000, together with the costs of prosecution, and that he stand committed until the fine and costs were paid.

To reverse this sentence this writ of error is prosecuted, and the errors assigned are:

1. That the second count of the indictment, under which the defendant was found guilty, is insufficient in law.

2. That the court erred in adjudging that the defendant should stand committed until the fine and costs should be paid.

The case was argued by WRIGHT WALKER & MINER, for the plaintiff in error, and by CRAPSEY, prosecuting attorney, for the state.

HITCHCOCK, J. The first question raised in the present case is, as to the sufficiency of that count of the indictment, under which the defendant, in the court below, was convicted. If we were to test this count by the rules of law, as applicable to ordinary cases, it would unquestionably be found to be defective. Every indictment should have a precise and sufficient certainty; should set forth the time and place of the commission of the offense. The offense itself should be set forth with clearness and certainty, and must be so described as to bring it substantially within the provisions of the statute. The description, in this case, is vague and indefinite. It may be sufficient as to time and place; but, although the defendant is charged with acting as an officer of a bank not incorporated by law, it is not stated what that office is; nor is the name or description of the bank given.

It is claimed, however, by the prosecuting attorney that this count is in conformity with the form prescribed by the legislature itself, in the law for the violation of which the defendant was indicted. If so, we do not feel ourselves authorized to declare it defective.

70] \*The act of January 27, 1816, "to prohibit the issuing and circulating unauthorized bank paper," Swan's Stat. 136, took effect on the 1st of May of the same year. In section 1 it is enacted, that if any person shall, within this state, act as an officer

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of a bank not incorporated by a law of this state, the person so offending shall forfeit and pay the sum of \$1,000. In section 3 those persons who shall be deemed and taken as officers of such bank are pointed out. In section 5 provision is made that all fines and forfeitures incurred under the act may be recovered by action of debt, or by indictment. And in the sixth is enacted, "that in every such indictment, or presentment, it shall be sufficient to state, in substance, that the defendant, on the — day of —, acted as an officer of a bank not incorporated by law, *without setting forth the special matter.*" By comparing the indictment now under consideration, with this form given us in the statute, it will be found that the form has been followed and adopted. And the indictment, being in conformity with this form, would seem to be sufficient.

It is claimed, however, by the counsel for the plaintiff in error, that a presentment, made by a grand jury, following, literally, this form, would not constitute an indictment; and, of course, to hold a person to trial under such an instrument, would be to violate the principles of the constitution. Section 10, of article 8, of this instrument, prescribes that "no person shall be put to answer any criminal charge but by presentment, indictment, or impeachment;" and section 11 of the same article, that "in all criminal proceedings the accused has a right to demand the nature and cause of the accusation against him, and to have a copy thereof."

It would seem to be claimed that no law can be passed that will materially change the forms of indictments as they existed at the time of the formation of the constitution. We do not so understand that instrument. It is true that no person can be put to answer any criminal charge but by presentment, indictment, or impeachment. An individual accused of \*a crime can not be [71] compelled to answer the charge until the same has been made through the intervention of a grand jury in the form of a presentment or indictment. Should the legislature pass an act to compel an individual to answer, without this prerequisite, such act would be in violation of the constitution and void. No such power is, as I believe, claimed by any of the numerous advocates for legislative supremacy. But this clause in the constitution has nothing to do with the particular forms of indictments. These forms will vary according to the nature of the criminal acts pro-

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hibited. The legislature have the power to declare what acts are criminal; and they have the same power to prescribe the forms of indictments for the commission of such criminal acts. They can not dispense with the indictment itself, but they can dispense with some of its technical formalities. Whether the ends of public justice are better attained by abandoning well-established precedents, is a different question. Daily experience teaches us that every innovation is not an improvement.

The simple question in this part of the case is, whether this instrument, following, as it does, the form prescribed by the statute, is an indictment. "An indictment," says Blackstone (4 Com. 302), "is a written accusation of one or more persons, of a crime or misdemeanor, preferred to, and presented by, a grand jury upon oath." This instrument, now under consideration, contains a written accusation of the plaintiff in error, of a crime, to wit, the crime of acting as the officer of a bank not incorporated by law; and it was presented by a grand jury upon oath. It is, then, an indictment, and we hold it to be sufficient.

The court of common pleas sentenced the plaintiff in error to pay a fine of \$1,000, and that he stand committed until the sentence is complied with. It is claimed by the counsel for the plaintiff in error, that the court had not power to order this commitment. In England, and in some of the states of this Union, where the punishment of an offense is by fine, a part of the sentence is, that the person convicted stand committed until the fine is paid. In this state 72] the whole \*matter is regulated by positive law. In some cases it is directed that a part of the sentence shall be, that the culprit so stand committed; in others, it is not. And there is a general provision of law, authorizing executions to enforce the collection of fines.

Under these circumstances, a majority of the court are of opinion that unless it is so provided by statute, the court has not power to order that a criminal stand committed for the non-payment of a fine; and that the court of common pleas erred in ordering the committal of the plaintiff in error. What is the consequence? That court, in conformity with law, adjudged that the plaintiff in error pay a fine of \$1,000; without authority of law, it was ordered that he stand committed until the fine was paid. So far as this sentence is in conformity with law, it should be affirmed; so far as it is against law, it should be reversed. Judgment accordingly.

## JOSEPH BONSALE V. THE STATE OF OHIO.

Under the act of January, 1816, "to prohibit the issuing and circulating unauthorized bank paper," it is sufficient to charge in the indictment, in general terms, that the defendant acted as an officer of a bank not incorporated by law.

An order that the defendant stand committed, until fine and costs be paid, is erroneous.

The judgment of the court of common pleas, in a criminal case, may be reversed in part, and affirmed in part.

THIS is a writ of error to the court of common pleas of Hamilton county.

The record shows that at the January term of said court, 1841, the plaintiff in error was indicted by the grand jury for acting as an officer of a bank not incorporated by law.

The indictment contains six several counts, of which it is only necessary to refer to the fifth and sixth.

\*The fifth charges "that the said Joseph Bonsal, on Jan- [73  
uary 4, 1841, with force and arms, in the county of Hamilton  
aforesaid, acted as an officer of a bank not incorporated by law,  
to wit, the Cincinnati and Whitewater Canal Company, contrary  
to the form of the statute, in such case made and provided," etc.

The sixth, "that the said Joseph Bonsal, on January 4, 1841,  
with force and arms, in the county aforesaid, acted as officer of a  
bank not incorporated by law, contrary to the statute, in such case  
made and provided, and against the peace and dignity of the  
State of Ohio."

To this indictment the defendant pleaded not guilty, and, at the  
same term of the court, the case came on for trial to a jury, who  
returned a verdict of guilty. Whereupon the court sentenced the  
defendant to pay a fine of \$1,000, and to stand committed until  
the sentence should be complied with.

The defendant then tendered a bill of exceptions, which was al-  
lowed by the court, and is made a part of the record. This bill  
of exceptions sets forth that, on the trial of the cause, "it was  
proven that all the notes issued were by order of the board of the  
Whitewater Canal Company, and that their object, by such issue,

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was to raise funds to complete the canal. That an arrangement was made with the several contractors on the canal, who agreed to receive such paper (a bill of which is attached, and made a part of the bill of exceptions), in payment for their work, and indorse the same, and employ the same as money or funds to purchase labor and materials to complete their several contracts. Joseph Bonsal procured a plate to be engraved, for which he paid \$500 in Whitewater bills; had the paper, which was now put in circulation, struck, filled up, and delivered over to the several contractors and persons whom the company owed, who indorsed the same, and put it in circulation. That the whole issue of this paper was to persons to whom the company was indebted as contractors, or persons who had performed some service for the company, or persons who claimed damages. That the paper, thus issued, passed and circulated, by delivery, as money." It was further proved, that of \$268,000 of notes so issued, \$98,000 had been taken up by the company before they had become due, according to their face; and that none so taken up had ever been reissued. That the motive of the board of directors of the company, in ordering such issue, was to anticipate funds from the state, from the city of Cincinnati, and from individuals whose subscriptions were in arrear, and to prevent a stoppage of the work. The whole issue was of the denominations of one, two, three, and five dollars; a small part of which was of five dollars. That it all passed and circulated as money, and was so designed, intended, and calculated to pass and circulate as money, by the defendant, and those who were concerned in paying it out, and in putting it in circulation. And, also, that Joseph Bonsal did sign these notes, as president, and Samuel P. Foot, as secretary; and it was admitted that they were the president and secretary of the Whitewater Canal Company, incorporated by law, and consisting of divers persons.

"And thereupon the defendant requested the court to charge the jury that they must take the intention into consideration, and if there was no intention to do a banking business, they could not find the defendant guilty. But the court charged the jury that an intention to accomplish a good object by an issue of unauthorized bank paper was no excuse; and, if such unauthorized bank paper was put in circulation, it mattered not what good object was had in view, or what good motives prompted such illegal issue, the parties concerned might be found guilty."

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"The defendant also requested the court to charge the jury, that if the notes were not in a negotiable form when they left the control of the company, they could not find the defendant guilty. But the court charged the jury that if they were satisfied, by evidence, that the individuals incorporated as, and composing, the Whitewater Canal Company, had acted beyond \*the scope of their [75 chartered rights, in issuing and putting in circulation unauthorized bank paper, such individuals, to the extent of such unauthorized act, were to be treated as individuals not incorporated. And that if the jury believed, from the evidence, that the bills, notes, or paper, so made and paid out, were evidences of debt in the similitude of ordinary bank bills, and were designed, calculated, and intended to circulate as money, and pass, by delivery, as money, by those who made and paid them out, and put them in circulation, and that such paper was so considered, and did actually so pass and circulate, although at the time said paper was paid out to the creditors of said Whitewater Canal Company it was not indorsed in blank, or payable to bearer. Yet if such shifts and devices had been resorted to in the form and appearance of said paper, that it would, at the time it was so paid out by said company, pass, by delivery, and circulate as money, and actually did so pass and circulate, and that those who then made and paid out said paper in such form and appearance, designed and intended, by resorting to such shifts and devices, that it should so pass and circulate, by delivery, as money, such description of paper was unauthorized bank paper. And if an association of individuals had put into circulation such a description of paper, and paid it out for debts, and defendant had signed his name to such paper, so issued, as an officer, the jury might find him guilty." The note attached to the bill of exceptions is upon paper like, and in the similitude of, ordinary bank notes or bills, and in form as follows, to wit:

No. 22,208.

ONE.

1.

ONE. The Cincinnati and Whitewater Canal Company promise to pay to M. Davis, or order, twelve months after date, one dollar, for value received, at their office. Cincinnati, December 5, 1840.

SAMUEL P. FOOT, *Sec'y.*JOSEPH BONSAI, *Pres't.*

Indorsed in blank by M. Davis.

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76] \*This writ of error is prosecuted to reverse the sentence of the court of common pleas in this case, and the errors assigned are:

1. That neither count of the indictment sets forth sufficient legal ground to warrant the sentence of the court.

2. The court refused to charge the jury as requested by defendant.

3. General errors.

WRIGHT, WALKER & MINER, for plaintiff in error.

CRAPSEY, prosecuting attorney, for the State of Ohio.

HITCHCOCK, J. From an examination of the indictment, in this case, we incline to the opinion that the first four counts are defective, but if there be one good count in an indictment, and the verdict is general, such good count is sufficient to authorize the court to pass sentence, or enter up judgment. The fifth and sixth counts in this indictment are similar to the indictment in the case of *Lougee v. State of Ohio*, decided at the present term, and which, after full consideration, was held by the court to be sufficient.

Before proceeding to examine the case, as presented in the bill of exceptions, it is necessary to ascertain, definitely, what was requested, by the defendant, of the court, in charging the jury, and what were the instructions actually given.

The first instructions requested, were, that the jury must take the intention into consideration, and if there was no intention to do a banking business, the defendant could not be found guilty.

The court, instead of giving such instructions, directed the jury, in substance, that an intention to accomplish a good object, by an issue of unauthorized bank paper, would not excuse such an issue. If the act done was illegal, the motive leading to the commission of such illegal act could not excuse its commission. In other words, that in law, at least, the end will not justify the means.

77] \*In the second place, the defendant requested the court to charge the jury that, if the notes were not in a negotiable form when they left the control of the company, but were afterward negotiated without the previous consent of the company, the defendant could not be found guilty. The charge which followed, upon this request, is somewhat confused, but, upon careful examination, seems, in substance, to have been that if the jury was sat-



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ified, from the evidence, that the Whitewater Canal Company, not being authorized by law so to do, had issued and put in circulation unauthorized bank paper, the individuals constituting the company could not be protected, by their act of incorporation, from the legal consequences resulting from such issue; and that, if the jury believed that the bills, notes, or paper issued by said company, as evidences of debt, were in the similitude of ordinary bank paper or bills, and were designed, calculated, and intended to circulate as money, and pass by delivery, by those who made and paid them out, and that shifts and devices were resorted to, in the appearance of the paper as well as in its form, to obtain for it a circulation as money, the paper thus issued would be unauthorized bank paper. And an association of individuals putting such paper in circulation would be guilty of a violation of the law, although the same was not payable to bearer, or indorsed in blank, when it left the control of the association.

The inquiry is, whether there was anything wrong in the instructions given, or in refusing the instructions requested. This will lead us to an examination of the law, for a violation of which the plaintiff in error was convicted. And, in order to give a proper construction of this law, it will be necessary to inquire into the cause of its enactment, as well as of the mischiefs which it was intended to remedy.

Previous to the declaration of war, in 1812, but six banks had been incorporated in the State of Ohio, and were in operation. These banks had been found to be, or, at any rate, were supposed to be by the people of that day, institutions beneficial to the interests of the state. Their credit was good, and their paper equivalent to specie. Shortly after the declaration of war, these [78 banks, as well as all others west and south of New England, were compelled to suspend specie payments. This suspension was, for the time being at least, winked at by the government. Still, the people had confidence in the banks, and their paper furnished the entire circulating medium; and it is a fact worthy of remembrance that the paper of these institutions, although much depreciated, was held to be more valuable than the paper issued by the government itself. Treasury notes issued by the government of the United States were, in the market, as much below the value of these depreciated bank notes as the bank notes were below the value of specie. In such notes the taxes to the states and to the

United States were paid, and in such notes were loans made to the government. Without them, the war could not have been prosecuted, and the government must have become bankrupt. But, in consequence of being relieved from the payment of specie, the banks were less cautious as to the amount of paper issued, and there is reason to believe that the business was profitable; at least it was so considered, and many associations were formed without the authority of law, and, as was believed, some of them without capital, for the purpose of transacting banking business. At this state of things the reflecting people of the state became alarmed, and on February 8, 1815, the first law was passed in the State of Ohio restraining individuals and associations from banking. Chase's Stat. 868. As the law of that year, so far as it operated as a restraining act, was repealed the next year, it is unnecessary to examine it.

At the next session of the general assembly, a number of additional banks were incorporated, and on January 27, 1816, the act now in force, "to prohibit the issuing and circulating unauthorized bank paper," was passed. Chase's Stat. 904. The first section of this act provides, "That if any person within this state shall act as an officer, agent, trustee, or servant, to any bank or moneyed association coming within the description contained in section 2 of this act, except a bank incorporated by a law of this 79] state, he shall, for every such offense, forfeit and pay the sum of \$1,000.

And section 2, "That every company or association, that shall lend money, and shall issue, by their officer or officers, or, by any other person or persons, bonds, notes, or bills, payable to bearer, or, payable to order, and indorsed in blank, or use other shift or device, whereby the bonds, notes, or bills, given by such company, or association, or on their behalf, pass or circulate by delivery, shall be taken and deemed a bank within this act."

"Sec. 3. Every person who shall act as a president, cashier, clerk, or director to any such bank, or shall, in any respect, assist in discounting paper, or lending money for such bank, or in paying out and receiving money for such bank, or, in any manner, intermeddle with such bank, or its concerns, and every person, whose handwriting shall appear on the bond, bill, note, or contract of such bank, whether as a drawer thereof, or a payee and

indorser, shall be deemed and taken an officer of such bank, within the meaning of this act."

From these sections, it will be seen that the leading object of the bill was to prevent unauthorized banking, and in this way, prevent the currency of bonds, notes, or bills, which had not been issued by responsible institutions, or by institutions recognized by law. Associations that "shall lend money, and shall, by their officers, issue bonds, notes, and bills," are the associations prohibited. It has, by some, been contended that the word "*and*," as here used, should, for the purpose of preventing the evil complained of, be held as having the same meaning as the word "*or*;" but, at the time this act was passed, it was not supposed that any association would issue notes or bills, to pass and circulate as money, unless coupled with the design of loaning the same, and thus making a profit.

In the case now under consideration, the counsel for the plaintiff in error requested the court of common pleas to charge the jury that, if there was not an intention to do a banking business, he could not be found guilty. This instruction was not given. Had the law of 1816 been the only law upon the subject, [80 probably here would have been an error; but it had been found, that associations, which did not do a banking business, had adopted the practice of issuing notes and bills intended to circulate and pass as money. To remedy this evil, the general assembly, on March 18, 1839, passed an act to amend the before-recited act of January 27, 1816. Swan's Stat. 140.

By section 1 of this amendatory act, it is provided: "That every company or association, except a bank incorporated by a law of this state, that shall lend notes, bonds, bills, checks, orders, certificates of deposit, or any other evidence of debt, and shall issue, by their officer or officers, agents, or any other person or persons, notes, bonds, bills, checks, orders, certificates of deposit, or other evidence of debt, payable to order, and indorsed in blank, or payable to bearer, designed, calculated, or intended to circulate as money; or shall issue, put in circulation, or pay out, for debts or property, *with or without any such loan*, any such notes, bonds, bills, checks, orders, certificates of deposit, or other evidence of debt, *or use other shift or device*, whereby any such notes, bills, bonds, checks, orders, certificates of deposit, or other evidence of debt so issued, put in circulation, or paid out by said company or associa-

tion, or on their behalf, pass and circulate by delivery, shall be taken and deemed an unauthorized bank, within the meaning of the act to which this is an amendment, entitled 'an act to prohibit the issuing and circulating of unauthorized bank paper,' passed January 27, 1816."

From the passage of this amendatory act, it must be considered, in connection with the law of 1816, as if it had actually constituted a part of that law, at the time of its enactment, so far as relates to offenses committed subsequent to the passage of the amendatory law. Considering it in this light, there can be no doubt that an association violates the law by putting in circulation notes, bills, etc., intended to pass as money, whether accompanied with an intention of doing a banking business, or otherwise. Of course, it would have been improper for the court of common pleas to have given the instruction first requested.

81] \*The court were next requested to instruct the jury, that, unless the notes were indorsed in blank, before they left the control of the company, the defendant could not be found guilty. This was refused by the court, or, rather, such instructions were not given, in so many words, although I incline to the opinion that such instructions were, in substance, given, or such as were equivalent. If not so, the question arises, whether such instructions, given unconditionally, would have been proper. The bill of exceptions shows that these notes were payable to order; that they were, in similitude and appearance, like bank notes, and struck upon an engraved plate; signed by the president and secretary of the company; and that, when issued, it was intended, designed, and calculated by the defendant, and those who were concerned in paying them out, and putting them in circulation, that they should pass and circulate as money; and this, too, under an agreement and understanding, with those to whom the notes were paid by the company, that, so soon as they should receive them, they should indorse them in blank, and circulate them as money. It is apparent that the creditors of the company, to whom these notes were paid, were as much concerned in this transaction as the canal company itself. They had a part to act in purchasing this paper for circulation, and this part was to indorse it. By such indorsement, they, as well as the officers of the company, made themselves liable to the penalty of the law, which provides that "every person, whose *handwriting* shall appear on

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the bond, bill, note, or contract of such bank, whether as the drawer thereof, or witness, payee, or *indorser*, shall be taken, and deemed, an officer of such bank." Under such circumstances, it is but a poor subterfuge to claim that the plaintiff in error was guiltless, because the indorsement was made after the instrument was paid out by the company. It is, at best, but a miserable "shift or device," by which to avoid the penalty of the law. In our opinion, the court did not err in refusing to give the unqualified instruction, as requested.

\*Nor do we see any error in the instructions actually given. [82 Surely, it was proper for the court to say to the jury, that the defendant could not excuse himself from liability, for an illegal act, on the ground that the ulterior object in view was a good one. Nor was it improper to instruct the jury, that if the defendant had made use of "shifts and devices," to procure for the paper issued a circulation as money, he was guilty, although the paper was not payable to bearer, or indorsed before it left the control of the company. Whether such "shifts and devices" had been used, was a question of fact for the jury to determine.

The record shows that the court of common pleas, in addition to the assessment of a fine, sentenced the plaintiff in error to stand committed, until the fine and costs should be paid. This part of the sentence, according to the decision of this court, in the case of Lougee against the state, already referred to, is erroneous; and, so far, the judgment of the court of common pleas is reversed. So far as respects the fine and costs, the judgment of that court is affirmed. Judgment accordingly.

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JAMES STEEDMAN v. THE STATE OF OHIO.

Individual notes, intended to pass as currency, or money, are not competent evidence against the person issuing them, on an indictment for acting as an officer of a bank, without proving that there was a company, or association of individuals, formed for the purpose of putting in circulation such notes.

THIS is a writ of error to the court of common pleas of Hamilton county.

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The record shows that, at the July term of said court, 1840, the plaintiff in error was indicted "for passing unauthorized paper." The indictment contains four counts.

83] \*In the first count it is charged that, "James Steedman, on January 1, 1840, with force and arms, in the county of Hamilton aforesaid, and on divers other days between that day and the finding of this bill, notes, payable to bearer, and intended to circulate as money, to a large amount, to wit, to the amount of \$2,000, did issue and put in circulation, one of which notes is as follows, that is to say: 'I promise to pay to James Bailie, or bearer, at the office, No. 32, of J. Steedman, in Cincinnati, twenty-five cents in current bank notes. Cincinnati, No. 40 Front street, July 4, 1840. J. Steedman,' contrary to the statute, in such case made and provided, and against the peace and dignity of the State of Ohio."

The second count is substantially like the first.

The third charges the defendant with having put in circulation a large amount of promissory notes, to wit, the amount of \$2,000, all of which were designed and intended to circulate as money, and were of the denomination of twenty-five cents each.

In the fourth count it is charged, "that the said James Steedman, on January 1, 1840, with force and arms, in the county of Hamilton aforesaid, and on divers other days between that day and the day of finding this bill, did act as an officer of a bank, not incorporated by law, contrary to the statute," etc.

The defendant pleaded not guilty, and, at the same term of the court, the case was tried by a jury. The jury found the defendant guilty, as charged in the fourth count in the indictment, and not guilty, as charged in the first three counts.

After verdict the defendant moved the court for a new trial, which motion was overruled, and he was sentenced to pay a fine of \$1,000 to the State of Ohio and the costs of prosecution, and to stand committed until the fine and costs were paid.

Whereupon the defendant filed his bill of exceptions, which was allowed by the court, and is made part of the record, and which 84] is as follows: "On the trial of the above cause, before \*the court of common pleas of said county, at the July term thereof, 1840, the notes, which are described in the three first counts of the indictment, and one of which is hereto attached and made a part of this bill, were, by the prosecutor of the state, read in evidence to the jury, and there being evidence going to prove that

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Steedman and other persons were concerned in having the plate made upon which said notes were struck, and that Steedman had issued, paid out, and redeemed notes of this description; the evidence being closed, the defendant moved the court to charge the jury that said notes would be no evidence to sustain the fourth count of said indictment, which charge the court refused so to give, to which refusal of the court so to charge, the defendant excepts," etc.

*Copy of Note, attached to Bill of Exceptions.*

No. 65.

25 I promise to pay J. Bailie or bearer, at the office of J. CENTS. Steedman, in Cincinnati, twenty-five cents, in current bank notes. J. STEEDMAN.

CINCINNATI, No. 40 Front street, July 4, 1840.

To reverse this judgment the writ of error is prosecuted, and the errors assigned are:

1. That the fourth count of the indictment is not sufficient, in law, to sustain the judgment.

2. That the court erred in allowing said notes to go to the jury, as competent evidence, to sustain the fourth count of the indictment.

3. General error.

The case was argued by FESSENDEN, for the plaintiff in error, and by CRAPSY, prosecuting attorney, for the state.

HITCHCOCK, J. This was an indictment, against the plaintiff in error, for a violation of the act of 1816, to prevent the \*is- [85 suing and circulating of unauthorized bank paper, and the several acts amendatory thereto.

This act, of 1816, in the first place, makes it criminal for any person to act as an officer of any banking association not incorporated by a law of this state, and, for a violation of this provision of the law, inflicts a penalty of \$1,000.

The fourth section prohibits the receiving, and offering in payment, "the bond, bill, note, or contract of any such bank, knowing the same to be unincorporated," under the penalty of three times the amount of the "bill, note, or bond" so received and offered in payment. It also prohibits an person from receiving, and actually passing or circulating, the "bond, bill, note, or con-

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tract of such bank, by delivery, without indorsing the same, knowing such bank to be unincorporated," under the penalty or forfeiture of four times the amount of such "bill, bond, note, or contract," so received, passed, and circulated. Swan's Stat. 136. And it is further provided, in the same act, that all fines and forfeitures, imposed by the act, may be recovered by an action of debt, or by indictment.

Thus, it will be seen, that this act provided for those distinct classes of offenses, and inflicted different penalties, according to the nature of the offense. The first offense is that of acting as the officer of an unauthorized bank; penalty, one thousand dollars. The second, that of receiving and *offering* in payment a bill or note of such unauthorized bank; penalty, three times the amount of the bill or note offered in payment. Third, that of receiving, and actually passing and circulating the paper of such bank; penalty, four times the amount of the paper circulated.

This act of 1816 did not, however, prohibit any person from issuing his own individual notes, intending the same to circulate and pass as money. Whether this omission was in consequence of the fact that notes of this description had not then been put in circulation to any considerable extent, or from what other cause, we do not know. But immediately after the suspension of specie [86] payments, by the banks, in 1837, \*the country was flooded with paper of this description. The evil was felt to be a great one, and, at the next session of the general assembly, an effort was made to check it. On February 16, 1838, an act was passed, which took effect the 1st of July of the same year, to amend the act of 1816. The third section provides, "that from and after the taking effect of this act, it shall be unlawful for any *individual* to issue and put in circulation any bond, bill, note, order, or check, for the payment of money, whether written or struck upon an engraved plate, calculated or intended to circulate as a currency or medium of exchange, and which shall not be authorized by law; and any individual who shall so issue and put into circulation any such bond, bill, note, order, or check, or who shall offer any such in payment of money or property, knowing the same to be unauthorized by law, shall be subject to the same penalties as is provided for in section 4 of the act of January 27, 1816, above referred to; and said penalties and forfeitures shall be re-



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coverable in the same manner as is pointed out in section 5 of said last-mentioned act," etc.

By this section, two more offenses are added to those enumerated in the law of 1816, to wit: that of issuing, by an individual, notes, calculated and intended to pass as currency, and that of offering such notes in payment of money or property. The penalty annexed is the same as prescribed in section 4 of the act of 1816, that is, three or four times the amount of the paper issued or offered in payment. Whether, in a given case, the penalty should be three or four times the amount, would, perhaps, be a question of difficulty, as, in this respect, the law does not appear to be explicit.

In the three first counts of the indictment, the plaintiff in error is charged, or intended to be charged, with the offense specified in section 3 of the act of 1838, already recited. That is, the offense of issuing and putting in circulation his own individual notes, intending the same to circulate as currency, and, from the bill of exceptions, setting forth the evidence in the case, it is clear, to my mind, that, of the offenses charged in these [87 counts, he was guilty. But, for some reason not apparent, he was, by the jury, found not to be guilty. If not guilty of these offenses, he certainly was not guilty of any offense whatever. In the fourth count of the indictment, the plaintiff in error was charged with having acted as an officer of a bank, not incorporated by law, was convicted of this offense, and was sentenced by the court, in pursuance of this finding, to pay a fine of \$1,000 and the costs of prosecution.

To this judgment, it is objected that the fourth count of the indictment is insufficient in law.

This count, as already stated, is against the plaintiff in error, for acting as an officer of a bank not incorporated by law. It charges "that the said James Steedman, on January 1, 1840, with force and arms, in the county aforesaid, *and on divers other days, between that day and the day of finding this bill*, did act as an officer of a bank not incorporated by law." It is like the indictment in the case of *Lougee v. State of Ohio*, decided at the present term, and which was held by the court sufficient, except that the words in italic are not contained in the indictment of *Lougee*. Whether the fact that these words are contained in the indictment can vary the case, is perhaps questionable. We suppose that where the offense

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consists of the performance of a specific act, it is necessary that it should be charged in the indictment to have been committed on a day certain, although it is not necessary that the proof should, in this respect, sustain the indictment. In other words, the offense may be proved to have been committed on a different day from that laid in the indictment. But whether, after having charged the offense upon one day, it will do to lay it with a *continuando*, upon divers other days, as in a declaration in trespass, is a different question. But for the purposes of this case, it is not necessary to decide this question.

The second error complained of is, that the court allowed said notes, mentioned in the bill of exceptions, to go to the jury as competent evidence to sustain the fourth count of said indictment, the same being by law incompetent. The court was requested to charge the jury that these notes were not competent evidence, under the fourth count, which was refused. The notes, upon their face, were the individual notes of Steedman, and were accompanied with proof that they were by him designed and intended to circulate as currency. These notes were proper evidence under the three first counts of the indictment. The act of 1816, under which the fourth count is framed, was intended to prevent any company, or association of persons, from acting as a banking association without being incorporated by law, and to prevent such association from putting in circulation any of their notes or bills, intending them to pass and circulate as money. To act as an officer of such an association, is made highly penal. But how can a man act as an officer of such an institution or association, until the association itself is formed? To convict one of acting as an officer of such an association, it would be necessary, in the first place, to prove that there was such an association in existence. Where is there any evidence to this effect, in the case before us? The only evidence in the case, as stated in the bill of exceptions, which in the least looks to such proof, is, that other persons were engaged with Steedman in having the plate engraved upon which these notes were struck. Whether these other persons were the engravers, or persons who wished to use the same plate for engraving notes to be issued in their own individual names, or who they were, does not appear. Surely, this evidence can hardly be said to conduce to prove the existence of such an association as is prohibited by law, much less is it evidence of that fact. It might be one link

in a chain of evidence to prove the existence of an association; but in the case before us, it is not only one link, but it is all the evidence we have. In the absence of proof of the existence of an association of the kind contemplated by law, these notes were not competent evidence under the fourth count in the indictment, and the court of common pleas erred in not so instructing the jury.

\*But it is said, by the prosecuting attorney, that all the [89 evidence given on the trial, is not contained in the bill of exceptions, and that this count is bound to presume that there were circumstances disclosed, which would justify the court of common pleas in refusing to charge as requested, and which would warrant the finding of the jury. Whether all the evidence, given in the case, is contained in the bill of exceptions, we do not positively know. In fact, the testimony, as narrated by the witnesses, is not given in that instrument, but the facts proved are stated, and, from the manner in which the bill is framed, the fair inference is, that they are *all* stated. It is true that if there had been no bill of exceptions in the case, we should have been bound to have presumed that all was correct.

But what are we asked to presume, in this case? In order to sustain this judgment, we are asked to presume that there was testimony, before the court of common pleas, to prove the formation of a company or association, to do a banking business, without the authority of law, and to issue, and put in circulation, bonds, notes, or bills, payable to order, and indorsed in blank, or payable to bearer, with the intent that the same should pass as currency or money; that Steedman was an officer of said association; and that the notes given in evidence, were issued by, or for, the benefit of said association. To presume this, would be to presume a great deal, for the sole purpose of sustaining a sentence, by which a man has been fined \$1,000, for circulating his own individual notes, for which offense the law inflicts a penalty equal to four times the amount of the notes so circulated. Whatever we might presume, with respect to a bill of exceptions, in a civil case, we shall long hesitate, before, in a case so highly penal as this, we shall make presumptions like those now required of us, to sustain a judgment.

The general error being assigned, it is proper to inquire whether the court of common pleas did not err, in refusing the motion for a new trial. I think a new trial should have been ordered. As before

## O. &amp; J. Towsey v. Avery.

90] remarked, the testimony given in the \*case clearly proved Steedman guilty of the charges laid in the first three counts of the indictment, but did not prove him guilty of the charge laid in the fourth count. As well might a man be convicted of burglary, upon proof that he had been guilty of larceny, as could Steedman, under the proof in this case, be convicted of acting as the officer of a bank. The truth is, he was acquitted of the offense of which he was guilty, and convicted of an offense of which he was innocent. And, as the jury may have been led into this error, by the mistake of the court, in refusing to charge as requested, I think the court erred in refusing a new trial. Judgment reversed.

## O. &amp; J. TOWSEY v. JOHN L. AVERY.

The act of March 19, 1838, abolishing imprisonment for debt, operates to discharge a recognizance of bail entered into before the act took effect.

THIS is an action of debt, from the county of Hamilton.

It is brought on a recognizance of special bail, for James Gonsoles, entered into on March 17, 1838. At the February term of Hamilton common pleas, 1840, the plaintiffs recovered a judgment against Gonsoles for \$860.50. On May 12, 1840, a *ca. sa.* was issued against Gonsoles, upon affidavit, that he was non-resident. The execution was returned *non est*.

The defendant plead *nil debet*, and gave notice that, by the act of March 19, 1838, abolishing imprisonment for debt, he was deprived of all control over the person of Gonsoles, and so released from his recognizance.

91] \*STARR, for the plaintiff, denied that the right of the defendant to surrender his principal, was taken away by the statute. He had a right to take him at any time, and without judicial process. *Nichols v. Ingersoll*, 7 Johns. 154.

HENDERSON, on the same side, cited *Miner v. Mechanics' Bank of Alexandria*, 1 Pet. 64; *Fisher v. Blight*, 2 Cranch, 386; *Canal Co. v. Railroad Co.*, 4 Gill & Johns. 1; *Talbot v. Seaman*, 1 Cranch, 35; *Mayor of Baltimore v. Howard*, 6 Harr. & Johns. 383; *Thomas v. Maham*, 4 Greenl. 513; *Adams v. Woods*, 2 Cranch,

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341; 9 East, 44; 1 Ld. Raym. 77. A statute will not be so construed as to take away vested rights. *Dark v. Vankleck*, 7 Johns. 477; *Ogden v. Blackledge*, 2 Cranch, 272; *Calder v. Bull*, 2 Dallas, 386; *Osburn v. Huger*, 1 Bay, 179; *Bedleston v. Sprague*, 6 Johns. 101; *Ogle v. Turnpike Company*, 13 Serg. & Rawle, 25; *Bedford v. Shilling*, 4 Cow. 334.

WRIGHT, WALKER & MINER, for the defendant, insisted "that the act abolishing imprisonment for debt being in favor of liberty, is to be construed liberally." To show the liberality extended to bail in other cases, they cited *Russell v. Champion*, 9 Wend. 462; *Durham v. Macomber*, 5 Wend. 113; *Kane v. Ingraham*, 2 Johns. 404; *Holley v. Cobb*, 1 Burr. 264; *Olcott v. Sibley*, 4 Johns. 409; *Doug.* 45; 6 Tenn. 247; 2 Bos. & Pul. 45.

Fox, on the same side, cited *Beers v. Haughton*, 9 Pet. 329; *Loflin v. Towler*, 18 Johns. 335; *Boggs v. Teackle*, 5 Binn. 338; *McClung v. Bowers*, 9 Serg. & Rawle, 24; 1 McCord, 373.

GRIMKE, J. The questions which are presented in this case are:

1. Would the defendant have been entitled to an *exoneretur*, without an actual surrender of the principal, any time between March 19, 1838 (when the act abolishing \*imprisonment for [92 debt took effect), and May 1, 1839, when the right to imprison was reordained, as against non-residents? and,

2. If he had this right, can the same matter be taken advantage of, by way of plea to the action brought upon the recognizance? And if these questions are answered in the affirmative, then,

3. Did the act of March 16, 1839 (and which became of force on May 1, 1839), defeat the validity of the plea?

The first two questions are completely settled in the case of *Beers v. Haughton*, 9 Pet. 329. It was there conclusively shown, that wherever the principal would be entitled to an immediate and unconditional discharge, if he had been surrendered, there the bail are entitled to relief by entering an *exoneretur*, without any surrender. This was so held in *Mannin v. Partridge*, 14 East, 599; *Boggs v. Teale*, 5 Binn. 332; and *Olcott v. Sibley*, 4 Johns. 407. The same principle was determined in *Durham v. Macomber*, 5 Wend. 113, under the act exempting females from imprisonment; in *Russell v. Champion*, under the general act abolishing imprisonment for debt; and in *Trumbull v. Healy*, 21 Wend. 670, under an insolvent debtors' act. It was also shown, in the case of *Beers v.*

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Haughton, that wherever the bail are entitled to be discharged, as a matter of *pure right* they will not only be discharged on motion, but they may plead the same matter as a bar to a suit on the recognizance. Bail are said to be entitled to a discharge, as a matter of pure right, any time before the return of *non est* to a *capias ad satisfaciendum*; and they are said to be entitled to the same, as a matter of mere favor, any time before the return of the second *nihil*, on the *scire facias* against them. From March 19, 1838, then, until May 12, 1840, when the *ca. sa.* was issued under the amendatory act, the bail was entitled, without a surrender, to an *exoneretur* as a matter of *strict right*, and may therefore avail himself of the same matter as a defense to this suit, provided the principal could not, if a surrender had been made, have been imprisoned 93] \*at all. And that he could not, is also settled by the case of *Beers v. Haughton*. The principle of the determinations in *Sturges v. Crowninshield*, 4 Wheat. 200, and *Mason v. Haile*, 12 Wheat. 370, that the right to imprison constitutes no part of the contract, and that a discharge of the party from imprisonment does not impair the obligation of the contract, was again recognized and reinforced. The legislature, therefore, had power to pass the act abolishing imprisonment for debt, so as to make it operate upon pre-existing cases. And the only remaining question then is, whether the act of March 16, 1839 (and which took effect the 19th of March), is sufficient to make a difference in the case. And I confess I am unable to see how it should have this effect. The right to an *exoneretur*, as a matter of strict right, and not merely as a matter of favor, was perfect before the passage of that act, and was not dependent, in any way whatever, upon any of its provisions. The renewal of the right to imprison the principal, on the pursuit of a new procedure, is very different from the revival of the right of action against the bail. The supposition that the one depended on the other, could only have arisen from the idea that the right of the bail to a discharge was not matured prior to the passage of the act of 1839; whereas, as I have shown, it was perfect on March 19, 1838, two days after the recognizance was entered into, and could not, therefore, be defeated by any matter *ex post facto*. The defendant, therefore, is entitled to a judgment.

. Judgment for the defendant.

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State of Ohio v. Farmers' Bank of Canton.

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**\*THE STATE OF OHIO v. THE FARMERS' BANK OF CANTON. [94**

When the profits of a bank are applied in payment of stock, the profits, so applied, are subject to the tax imposed by the act of March 12, 1831, on dividends.

THIS is an action of debt, upon an agreed state of facts, from the county of Stark.

The Farmers' Bank of Canton was incorporated by act of December 16, 1817. By the application, to them, of section 27 of the act of 1816 (2 Chase's L. 913), dividends of so much of the profits of the institution as the directors might judge expedient were to be made semi-annually. By the act of 1831, "to tax bank, insurance, and bridge companies" (Swan's Stat. 916), the board of directors of each bank, etc., were to transmit to the auditor of state a statement of all dividends made by such bank within ten days after it may be made, so that a tax of five per centum on the dividend may be computed and collected. A penalty, not exceeding \$1,000 is imposed, in case of refusal.

It is agreed that the bank, between 1832 and 1837, besides its ordinary dividends, upon which the state tax was duly paid, at four different times, between the years 1832 and 1837, "applied and appropriated sums which amount, in the aggregate, to \$50,000 of the profits of the business, carried on by said bank, to the payment of the capital stock of the bank, belonging to the stockholders," without complying with the above requisition of the law. This action of debt is brought to recover from them the four penalties claimed to have been incurred by these neglects; and it presents the question, whether a tax attaches to such profits, earned by the bank, as are applied in payment of its stock, belonging to the stockholders.

A. W. LOOMIS, for the plaintiff.

JOHN HARRIS, for the defendant.

\*LANE, C. J. The nature of the interests belonging to a [95 corporation, and to the stockholders of such corporation, have recently been investigated by this court. State of Ohio v. Franklin Bank of Columbus, 10 Ohio, 91. As explained by the

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court, a corporation is a creature of the law, created to exercise certain franchises, and for this purpose is invested with specific powers, among which is that of holding property as a natural person, which is controlled by its proper officers, and may be sold for its debts, but is not the property of the individual corporators; that the separate shares of the stock, in a private corporation, are not the property of such corporation, but of the individual corporators; that bank stock, and the profits earned by its use, are the property of the corporation, but that, bank shares are the property of individuals.

Now, dividends in a bank, under the laws above cited, consist of that portion of its profits which the directors separate from the general stock, and apply to the benefit of the stockholder. Whenever, by the act of the directors, the ownership of profits is so changed that it ceases to be the property of the corporation, and becomes the property of the stockholder, it is a dividend of profits, upon which the tax was intended to apply. The application of the profits, in this case, to the shares, which are the property of the stockholder, is plainly a dividend, within this definition, and the neglect of furnishing the statement is an act incurring the penalty.

That penalty is any sum not exceeding \$1,000. As no attempts were made to conceal the acts, and as a communication has been had with some former officers of the state, in which doubts of the validity of this tax were seriously entertained, we think it is not just to impose a penalty beyond the tax and interest.

Judgment for plaintiff.

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96] \*THE STATE OF OHIO v. THE WASHINGTON SOCIAL LIBRARY COMPANY.

The Washington Social Library Company have no authority, either by charter or prescription, to exercise the franchise of banking.

Corporations can exercise only such powers as are expressly granted.

THIS is an information, in the nature of a *quo warranto*, filed by the prosecuting attorney of Montgomery county, against the



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defendants, to show by what authority they exercise banking powers.

GRIMKE, J. The information alleges that the defendants, from September 20, 1839, have used, without any warrant, charter, or grant, the franchise of banking, by issuing notes, receiving deposits, making discounts, and by other moneyed transactions usually performed by incorporated banks, and which none but such are authorized to perform. The plea states that the defendants were incorporated by the legislature of Ohio, by an act passed February 19, 1810, entitled "an act to incorporate the Washington Social Library Company," and, referring to the act at large, avers that thereby they have lawfully exercised and still use and exercise the banking franchise, and receive deposits, make loans, issue paper, etc.

To this plea there is a demurrer.

And the question presented is, whether the charter of the defendants gives them authority to exercise the franchise of banking.

Section 1 of the charter creates the corporation by the name of the Washington Social Library Company, and gives it a capacity of suing and being sued, of making contracts, a common seal, and the power to make by-laws. Section 2 gives the powers of acquiring, holding, and disposing by mortgage, or in such other manner as they shall deem most proper for the best interests of the corporation, any estate, real or personal.

\*Section 3 provides for an annual election, in the township of Montgomery, of directors, who are to execute the by-laws, etc.

Section 4 merely appoints seven persons directors, until the first annual meeting.

The mere recital of these provisions of the charter, one would suppose, was sufficient to satisfy any understanding, whether gifted with the highest powers, or possessing only the ordinary share of good sense, that the power of banking has never been conferred upon this corporation. It is merely created a library company, and all the authority which is given to it, is incidental to that object. Length of time is not relied upon, as giving a prescriptive right to the use of the franchise, and the defendants

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stand arraigned as having been guilty of the most palpable and fragrant violation of the law.

It has been argued that, before the restraining acts of February 8, 1815, and of January 27, 1816, banking was not a franchise; that it might have been exercised by any individuals, who were competent to contract, and that, therefore, a corporation might also lawfully exercise the same. Admitting this to be true, at the date of the charter, in 1810, though, I confess, I am not satisfied of its correctness, yet the defendants do not pretend that they commenced the exercise of banking powers before the passage of those laws. On the contrary, the information alleges the use of this power from September 20, 1839; and the defendants, in their plea, do not undertake to say that it begun at a period antecedent to those acts. When they commenced the use of this privilege, then, it was in plain violation of the law, and was a usurpation of a privilege, for the exercise of which they are unable to show any warrant whatever.

To presume powers to be vested in a corporation, which are not expressly granted, would be attended with great inconvenience; to presume a charter, would be attended with still greater—for, what sort of a charter is it? would be the next inquiry. Bank charters contain an infinite variety of provisions. Some are exceedingly restricted, while others are almost unlimited, in the power which they confer; and the shades of difference between these two extremes are so numerous that it would be impossible to form any definite idea of what were the powers intended to be granted in any particular case. The consequence is, that a body of men, to whom banking powers, in the abstract, were conceded, would be placed in an infinitely better condition than any other corporation in the state. Their powers would, literally, be unbounded, in consequence of the very defect which was inherent in their creation. That they were without law, would be a passport to the exercise of all law. It would require a much stronger case than is here presented, to presume the existence of the privilege in question. The demurrer, therefore, is sustained, and the judgment of the court is that the defendants be ousted and altogether excluded from the franchise of banking, and that the prosecuting attorney recover his costs against the defendants.

CHARLES ANDERSON, for the state.

ODLIN & SCHENCK and H. STANBERRY, for the defendant.

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Davidson v. Root.

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## JAMES N. DAVIDSON v. ABNER ROOT.

The lien of a judgment, or mortgage, is not lost by the organization of a new county which includes the incumbered land within its limits.

The lien of a judgment recovered in Huron county, is not taken away by the act for the erection of Erie county, although, by the division, the land bound by the judgment fell within the limits of Erie county.

THIS is a bill in chancery from the county of Erie.

The case is fully stated in the opinion of the court. No arguments came to the hands of the reporter.

\*Wood, J. This is a bill in chancery, filed by the vendor, [99 against the vendee, to compel the specific execution of a contract, by him, for the purchase of one undivided third part of two acres of land, in the township of Portland, in the county of Erie, with the improvements thereon. This contract was executed between the parties on June 2, 1838; and, by its terms, the consideration agreed to be paid was \$2,500; \$1,000 was paid in hand; \$500 was agreed to be paid on July 6, 1838; \$500 on July 6, 1839, and \$250 on July 6, 1840; the deferred payments bearing interest. *The two last installments, of \$750, with the interest thereon, remain unpaid.*

The respondent in his answer admits these facts, and avers his readiness to comply with the terms of the contract, provided he can do it with safety to his own interest; but insists upon the inability of the complainant to make him a good title, on completing the payments; and the doubt arises under the following circumstances: At the December term of the court of common pleas of Huron county, 1837, six months before the date of the contract, Festus Clark recovered judgment against the complainant and others for over \$2,000. At the date of this judgment, the land was embraced within the territorial limits of Huron county. Davidson, and others, then filed their bill in chancery, praying for relief against this judgment. Such proceedings were had, that this suit in chancery was appealed to the Supreme Court, and, at the August term, 1840, \$1,156.77 of the judgment of Clark, against the complainant and others, was perpetually enjoined; and the injunction of the common pleas, as to the residue, *dissolved*,

leaving, therefore, Clark's judgment, to the amount of \$944.26, in full force against the complainant.

In March, 1838, the county of Erie was erected and organized, embracing a part of the territory which before belonged to Huron county, and in which the land in controversy is situated. The 100] only reservation of rights, in suits pending, etc., \*in this act organizing the county of Erie, is in reference to proceedings before justices of the peace; while the higher judicial tribunals seem to have been entirely overlooked, or their proceedings regarded as entirely unworthy of consideration by the legislature. No execution has ever issued on Clark's judgment; and being a lien upon the lot in question, at its rendition, in December, 1837, the question arises whether it still continues a *subsisting lien*, and unless extinguished, prevents the complainant from conveying an unincumbered fee to the respondent.

Section 2 of the act entitled "an act regulating judgments and executions," provides "that the lands and tenements of the debtor shall be bound for the satisfaction of any judgment against such debtor, from the first day of the term at which judgment shall be rendered, in all cases where such land lies within the county where the judgment is entered; and all other lands, as well as goods and chattels, of the debtor, shall be bound from the time they shall be seized in execution." Judgment liens are of a purely legal character. They do not exist at common law. Their creation, extension, and continuance depend entirely upon statutory provision. Their operation, as a part of the remedy to enforce the collection of a debt, is governed by the terms of the statute. That the lien may attach, it is certain that, by the statute, the land must be in the county where the judgment is rendered, at the time of its rendition; or, if in another county, there must be an actual levy. And it is, therefore, supposed that when a new county is organized, with no saving clause in the act, and land subject to a judgment lien, in the old county, fall within the new organization, the lien ceases to exist. *We do not think so.* The lien being given by express provision, although it is admitted, as a part of the remedy, to be within the control of the legislature, must, nevertheless, remain until lost by the act of the judgment creditor, or taken away by subsequent legislation. There is nothing, express or implied, in the act of 1838, organizing Erie county, inconsistent with the existence or enforcement of this lien. It may be said

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that, after the division of the \*counties, the records of [101 Erie furnish no notice of this incumbrance to the purchaser. This is true; nor would they furnish such notice had there been ever so extensive a saving clause in the act. There is no difference, in our opinion, in principle, between this judgment lien and a lien created by mortgage, recorded in Huron county before the division. The record of Erie would have given no notice of the fact at the date of this purchase by the respondent. The law requires all instruments by which lands are incumbered to be recorded in the county where the land lies; but it has never been supposed that liens, created by such instruments, became inoperative, because the land incumbered, by a subsequent division, fell into a different county than that in which such instruments were recorded. Nor has a new record, in such case, been considered necessary to protect the grantee against subsequent purchasers without notice. The analogy between the two cases is complete.

The case of the People v. Morrell, 21 Wend. 575, is relied upon by the complainant as an authority that Clark's judgment lien was lost with the division of the county. If there is any analogy between the cases, it is very remote; so much so as not to be seen by us. In that case, the court held the division of a county ejected from office an associate judge of the court of common pleas, who fell within the new division; that his residence was changed by the operation of the law, and that the law required a continued residence in the old county as a qualification to hold and enjoy the office.

In the case at bar the law requires the land to lie in the county at the rendition of the judgment, that the lien may attach, but not that it shall continue in the same county that the lien may be preserved.

If, in this case, the amount due from the respondent to Davidson was sufficient to liquidate Clark's judgment, there would be no difficulty in decreeing a specific execution of the contract, and protecting fully the respondent's rights, by his seeing to the application of the money due the complainant to Clark's judgment; but such is not the fact. The difference is nearly \$300; and until this judgment lien is removed by the \*complain- [102 ant, the respondent should not be required to further execute the contract on his part, by paying the balance of the consideration.

Bill dismissed without prejudice.

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Parker v. Riddle.

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## WILLIAM PARKER v. THOMAS J. RIDDLE.

The indorsement of a note, not negotiable, is not an original undertaking between the indorser and indorsee; but it is collateral, and payment must be demanded, and notice given to the indorser, as upon negotiable paper.

The indorsement of such note, by a person not a party to it, is a guaranty.

Upon such guaranty, demand of payment must be made when the note becomes due, and notice given to the indorser before suit.

THIS is an action of assumpsit, from Hamilton county.

The declaration contains three counts. In the first, it is averred that, on September 17, 1839, to wit, at, etc., one T. L. Hilton made his certain promissory note, in writing, etc., and thereby, then and there, promised the said defendant, ninety days after date, to pay him the sum of \$152; and the said defendant, then and there, indorsed the said note to the plaintiff; and the plaintiff avers, that afterward, when the said note became due and payable, according to the effect thereof, to wit, on December 10, 1839, the same note was duly presented to said Hilton for payment, and payment thereof demanded, but neither the said Hilton, nor any person or persons on his behalf, did, or would, pay said note, or any part thereof, etc.; of all which premises, the said defendant, on the same day and year, had notice, etc.

The second count sets out the making and delivery of the said 103] note to the defendant, as in the first, and then avers, \*that, in consideration that the plaintiff, at the special instance and request of the defendant, would receive the said note in payment of so much money as therein specified, then due by the defendant to the plaintiff, the said defendant, by his certain memorandum, in writing, on the back of said note, agreed to guaranty the payment of the said note to the plaintiff, when the same should become due, according to the tenor and effect thereof; and the plaintiff avers that, on December 10, 1839, when the note became due and payable, the same was duly presented to said Hilton, and payment thereof demanded, but neither the said Hilton, nor any one on his behalf, did, or would, pay the same, etc.; of all which said several premises, the said defendant had *due notice*, whereby the defendant became liable to pay said note, and afterward, in

consideration thereof, promised to pay it, etc., when thereunto afterward requested.

The third count describes the said note as made by the defendant to the plaintiff, and that the defendant thereby promised the plaintiff to pay to him the said \$152, ninety days after the date, and avers the non-payment, etc.

The declaration contains also the common counts. To this declaration the defendant filed the plea of *non assumpsit*, and the note is now offered as the only evidence of his claim to recover by the plaintiff; and the question raised is, whether the note alone, under the averments contained in the declaration, is sufficient proof to entitle him to judgment.

CHARLES FOX, for plaintiff:

I contend, that whenever a man transfers a note, not negotiable, or if he transfers a note, negotiable, after the same has become due, he does, by the act of indorsing, promise to pay the note. The indorsement, in such case, is equal to the making of a new note, and may be declared upon as such. In 3 Mass. 274, the party was permitted by the court, to insert, over the signature, "for value received I undertake to pay the money within mentioned to the plaintiff."

\*This last was a case in which John Ames made a note to [104 Olin Ames, not negotiable, and the latter indorsed it, in blank, to the plaintiff, so that the same is identically the present case.

In 8 Wend. 421, it is held, that "the indorsement and transfer of such an instrument is good, so as to make the indorsers liable to the indorsee, although it will not give the indorsee a right of action, in his own name, against the maker. Again, the indorsement, in such a case, is equivalent to the making of a new note. *It is a guaranty* that the note will be paid; it is a direct and positive undertaking, on the part of the indorser, to pay the note to the indorsee, and not a *conditional one to pay, if the maker does not, upon demand, after due notice*. The indorser, in such a case, I apprehend, is not entitled to the usual privilege of an indorsee of negotiable paper. He stands in the relation of principal, and not surety, to his indorsee, and has no right to insist upon a previous demand of the maker and notice of non-payment. An absolute guaranty may be written over his indorsement, upon which a recovery may be had against him.

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The same doctrine may be found in Bayley on Bills, 65, and in Byles on Bills, 84.

Such I take to be the opinion of this court in 9 Ohio, 139. The principle of all these decisions I take to be this: The man, by indorsing the note, must be understood to mean something by so doing. As the note is not negotiable, his indorsement is not necessary to transfer the property in the note. To give effect to the indorsement, it must be construed into some sort of a contract. What contract can it be unless that of a promise to pay the note or a guaranty that the note shall be paid? Any other construction would render such an indorsement perfectly nugatory. If this indorsement is a guaranty of its payment, as held in 8 Wend. 421, of course no notice was necessary.

RIDDLE & ROLL, for defendants:

We contend that the authorities cited by plaintiff's counsel are 105] not applicable to the \*case now before the court, as will appear by reference to the cases themselves.

The note itself shows the character of the transaction. It was, no doubt, passed in the course of trade by Riddle to Parker, who unquestionably was to use due diligence to collect the same of T. L. Hilton, the maker. This is evident from the fact of the delivery of the note to Parker; for it can not be presumed that Riddle would pass the note to Parker, merely to hold in his hands, without any exertion to make the money off the maker of the note. If this was not the intention of Riddle, it seems difficult to determine what induced the transfer to Parker, except it was done in absolute payment of some debt that might have been due from Riddle to Parker, and taken by Parker as *absolute* payment. Had it been otherwise, it is quite reasonable to believe that Riddle would have executed his own individual paper to Parker without reference to the note in question. There is no evidence, then, going to controvert the above conclusions. It does not appear that Parker used the *slightest diligence* to collect the same from the maker; nor is there any evidence that the defendant was notified of the non-payment of said note after the same became due, which, by the laws of the land, should have been done in order to fix the liability of the defendant. Nor does it appear, in evidence, that the plaintiff ever considered the defendant liable on said note until suit was brought in this case. We contend that the defendant, in this case, can not be treated by the plaintiff as an original prom-



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isor on said note; for there is no testimony showing that the defendant put his name on said note when it was made, which is necessary to fix the defendant, either as a joint maker or original promisor, or as a surety for the payment of the same. In this opinion we are sustained by the decision of the court in 9 Ohio, 139, cited by plaintiff's counsel. It is clear, then, in order to fix the liability of the defendant on this note, that the plaintiff should have notified him of the non-payment by the maker, as we regard that to be the true light in which this transaction is to be viewed, and contend that the settled principles of law governing [106] negotiable paper and liability of indorsers, must likewise govern this case.

We rely on the case of *Green v. Dodge and Cogswell*, 2 Ohio, 439, in connection with the uniform decisions on the same question, to sustain the defendant in this case.

WOOD, J. The first count is on a note, not negotiable, being made payable to Hilton, without the words *order or bearer*, indorsed before due, and presented for payment on the 10th of December, six days before due, and of which payment was refused, and notice thereof on the same day given to the defendant. The introduction of the note, the only evidence offered, proves only its execution and indorsement. This is clearly insufficient under the averments in this count. It proves neither the presentment of the note, and demand of payment of the maker when the note became due, nor in a reasonable time thereafter, in the language of the statute, nor notice to the indorser, which is required by all authority, as the indorser's undertaking is collateral, to pay only in default of the maker, and due notice thereof. But, if the introduction of the note proved every averment made in this count, the plaintiff would be in no better condition; for the presentment for payment to the maker, refusal, and notice thereof, are laid six days before the note became due, and when there was neither legal nor moral obligation to pay.

The second count is against the defendant as a guarantor; sets out the consideration of the guaranty, and avers that the defendant thereby agreed to guaranty the payment thereof to the plaintiff, when the note should become due and payable, etc.; and again avers the presentment to the maker for payment, on the same December 10, 1839, and that the defendant afterward had due notice.

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Here are the same objections to the proof, and if proved, the averments show no right of recovery.

The third count describes the note as made by the defendant to the plaintiff; lays the promise as an original undertaking 107] \*to pay the plaintiff \$252, ninety days after date; and it is to this count our attention has been specially directed.

The authorities cited, show that it has been held, in some of the states, that where a note, not negotiable, or a note negotiable, by its terms, after due, is transferred, the act of indorsing is a promise to pay the note; that it is, in effect, the creation of a new note between the indorser and the indorsee, and may be declared on as such. Though the transfer of such note does not give a right of action against the maker, in the name of the indorsee, it is good against the indorser, and is a guaranty that the note will be paid. It is a positive undertaking, and not conditional, to pay, if the maker does not, on demand, and notice to the indorser. 8 Wend. 421. There are also other authorities, to the same import, to be found in the books, where such contract has been held to be an original, and not a collateral undertaking.

In Vermont, a different rule prevails. It is there held that the indorsee of a promissory note, not negotiable, follows the law merchant, in making demand of payment, and giving notice of non-payment to the indorser. 1 Vt. 136.

When the decisions of the highest judicial tribunals of our sister states are found to conflict with each other, this court must, of necessity, be left to select from the one or the other, or to prescribe for itself the rule, in our opinion, most conformable to reason and justice, most applicable to our local enactments, in analogy with our own and the general opinion of the profession, and, in cases of this kind, with the sense of the mercantile or business community.

In this, however, it would, perhaps, be as difficult to unite our opinions as to reconcile decisions in direct conflict. One member of the court holds the promise as original, as set forth in this count. The majority, however, hold it to be collateral, and subject, in some degree, to the usages of mercantile law, as applied to the indorsee of negotiable paper; and this opinion is decisive against the plaintiff on this count. It is holden by two of the judges that a demand upon the maker, when such note becomes due, and rea- 108] sonable notice to the indorser, \*or notice before suit brought,

would be necessary to charge the defendant as a guarantor, as declared against in the second count.

All unite in the opinion, that the name of the payee, in blank, appearing upon the note, is not a guaranty, but an indorsement, while the name of a person, out of the note, appearing upon it, would be a guaranty. In such case, a majority of the court are of opinion to charge the guarantor. Demand of payment must be made when the note becomes due, and notice, before suit brought, given to the guarantor; while one member holds that the guarantor is not liable, unless the maker be prosecuted to insolvency, and notice thereof given to the guarantor; and we are unanimous in opinion that such prosecution, though a majority hold it unnecessary, and notice thereof, will enable the plaintiff to sustain the action.

The two first counts were disposed of, in the outset, on different grounds, however. The third is disposed of by the opinion of a majority of the court, that the promise therein laid is not, as stated, an original undertaking, and is therefore not sustained by the introduction of the note; and there is no evidence to apply to the common counts. Judgment for the defendant.

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**\*LOT PUGH AND WILLIAM J. SHULTZ v. GERRARD R. CHES- [109  
SELDINE.**

In the sale of real estate at auction, a mistake by the auctioneer in entering the name of the owner of the real estate in the memorandum of sale, will be corrected in equity.

If the purchaser has treated the contract as valid, although he might have abandoned it, he will be required to perform.

When the contract is for a good title, a quitclaim deed is sufficient, if the grantor has the title.

THIS is a bill in chancery, from the county of Hamilton, to enforce the specific performance of a contract for the purchase of real estate.

The complainants are the assignees of Charles Shultz; and, as such assignees, were the owners of the property described in the

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bill. On May 27, 1839, this property was sold at public auction, and the defendant, Chesseldine, became the purchaser, at the price of \$14,050. The terms of sale, and the defendant's bid, were reduced to writing, at the time, by the auctioneer, John J. Wright. The following is a copy of the terms of the sale, proved by the auctioneer, as entered by him at the time: "*For C. Shultz, May 27th, at auction, corner of Lower Market and Main street, fifteen feet front, by forty-six feet deep; Chesseldine. Terms of sale, one quarter cash; balance in twelve, eighteen, and twenty-four months, with interest, secured by mortgage. J. J. Wright, auctioneer.*"

The defendant, in his answer, denies the substantial allegations in the bill.

1. That the premises were advertised for sale at auction.

2. That the complainants were the owners of the lot.

3. That a sale was made to the defendant, or that any contract, or memorandum of a sale, by complainants, to him, was made, *in writing*, at any time, or signed by him or his agent.

110] \*4. He denies any tender of a deed or any demand, to comply with the terms of sale.

5. Denies he has been in the possession of the premises, as a purchaser; but held them under a lease, dated January 5, 1839, and afterward extended to January 15, 1840; and that *Charles Shultz* always called for and received the rent.

The defendant avers, that about May 27, 1839, the auctioneer offered sundry lots at auction, etc., all of which he proclaimed to be clear of all incumbrances, and that, if a good title could not be made in ten days from the sale, it was to be *no sale*, and the purchasers released from their bids; that the defendant bid upon *those* terms; but that, on examination, he afterward ascertained that the premises were subject to two mortgage *liens*, to the Bank of the United States, for nearly \$50,000; that a suit was, and is still, pending in reference to the title to the premises, to which the respondent was not a party, and of which mortgages, and the pendency of which suits, he had no notice at the time of sale, or he should not have bid thereon. The defendant avers, that as soon as he discovered the defects he gave up all intention of taking the property, and communicated the same to Charles Shultz, and came to an understanding with him, that the purchase should be abandoned, and that it was relinquished accordingly. He avers that no valid title can be made, and that he ought not to be held

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to said purchase, after so long delay, and want of good faith, on the part of the complainants. The defendant also relies upon the statute of frauds.

CHARLES FOX, for the plaintiff :

The first question for the decision of the court is as to the validity of the contract.

The memorandum says, for Charles Shultz, May 27th, at auction, to Chesseldine, the lot was sold for \$14,050; and the great question is as to the propriety of showing that, in making the sale, the auctioneer sold for William J. Shultz and Lot Pugh. In order to understand that matter more distinctly, \*it may be as well to [111 state that Charles Shultz was the original owner of the property; that in 1834 he became embarrassed, and made an assignment of the property in question, with other property, to William J. Shultz and Lot Pugh, for the benefit of his creditors. He made a deed to Shultz and Pugh, of the property in question, in trust to sell and dispose of, to pay off, first, the mortgages on the property; second, to pay certain preferred debts, etc.

This deed was immediately recorded; the assignees took possession of the property and collected the rents from that time, and applied them, from time to time, in liquidation of the mortgages; and Chesseldine, the defendant, had been occupying the premises, which he purchased, from the time of the assignment to the date of the sale.

During all this time Charles Shultz had been acting as the agent of the assignees in collecting the rent of Chesseldine, and gave receipt in the name of the assignees.

Can the assignees, the principals in this case, take the benefit of a sale of their own property, made in the name of their agent?

It will hardly be denied that, in ordinary cases, even at law, the principal may sustain an action in his own name, on a written contract, made in the name of an agent. If it should be contended otherwise, the books abound with such cases. *Baring and others v. Corrie* and another, App. to Long on Sales, 321, shows that in a sale made by plaintiffs' broker, *in his own name*, the plaintiffs were entitled to recover, and the purchasers who held acceptances against the broker, and who expected to have paid for the goods with those acceptances, were not permitted to offset the broker's acceptances. 2 Barn. & Ald. 137. A sale by a factor, whether he have or have not named his principal at the time of

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the sale, creates a contract between the owner and the buyer. 7 Mass. 319; 1 Johns. Cas. 488; Long on Sales, 249. A sale by the broker, in the name of the principal, where the sale note was in the name of the principal, was held to be a contract on which the broker could recover. 2 Esp. 493. "If a factor sells goods 112] for a principal, he \*may bring an action in the name of the principal; so, a vendor of goods to a factor, for the use of his principal, may maintain an action against the principal. 1 Atk. 248. So, where an agent contracts for his principal, under seal, when he had no authority to sign a sealed certificate, the principal will be liable in assumpsit. 19 Johns. 60. If an agent make a deposit on a treaty, for a purchase conducted by him in his own name, and without disclosing his principal, the latter may, nevertheless, upon the failure of the seller to fulfill the bargain, recover it in his own name. Long on Sales, 257; 1 Camp. N. P. Cas. 337. In the case of Coles v. Trecothick, 9 Ves. Jr. 234, the vendor was held bound to convey, where a clerk of the auctioneer signed an agreement, signed "Evan Phillips for Mr. Smith, *agent for the seller*." This agreement was held good under the statute of frauds, and Coles, the principal, obtained a specific performance, although his name nowhere appeared in the agreement.

The mere fact of inserting the name of Charles Shultz, who was the agent merely of Pugh & Shultz, can have no greater effect in this than in any other case where the name of the agent only has been used. This is precisely one of those cases where, if the principal was not bound at law by the form of the contract, a court of equity would enforce it against the principal. 3 Taunt. 167; 3 Ves. & Beam. 187; 4 Bing. 722; 4 Taunt. 209. In the State v. Perry, Wright, 663, this court held a contract made with the canal commissioners, was a contract with the state, and could be recovered on as such.

The next question presented is, whether the memorandum is a sufficient memorandum, in writing, under the statute of frauds and perjuries? Our statute, like most of this class of statutes in other states, requires the agreement, upon which such action shall be brought, or some *memorandum or note thereof*, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized.

113] \*It is well settled, that any memorandum or note of the

contract, showing the important terms thereof, is sufficient, and that it is not necessary both parties should sign the contract; if the party sought to be charged has signed the memorandum, that satisfies the statute. 9 Ves. Jr. 351; 14 Johns. 484; 7 Ves. Jr. 275. Again, in *Allen v. Bennet*, 3 Taunt. 168, the name of the agent, only, appeared in the memorandum, and yet it was held the principal was bound by it. Bennet's agent wrote in Allen's book as follows: "Ordered from H. & G. Bennet, Liverpool, 12 cwt. fine shag tobacco, at 3s. 8d.—2d. per lb. discount—bill in two months, at M. Wright's, September 11, 1809." On September 23, the plaintiff wrote to the defendants, in which, after giving reference as to his credit, he added: "The eight hundred weight of fine shag tobacco I wish immediately forwarded, as I have sold it, and it is wanted; I likewise want the invoice of the rice, and the other tobacco." The court decided that, although the name of Bennet's agent only was signed, Bennet was bound; and although the name of the buyer did not appear in the memorandum, yet, as it did appear in letters written by the Bennets subsequently, it was sufficient. And the court say: "I see no objection why it should not be made out what was the name of the *buyer*, by the writing of these very defendants. It is in writing, and is evidently connected with the contract, that no doubt it may be coupled with the order in the book; and a valid contract may be established by the evidence of several writings, as we often see it at nisi prius."

In *Phillimore et al. v. Barry* and another, 1 Campbell, 513, the defendants had written to Messrs. Fector & Minet, to buy thirteen puncheons of rum, at a contemplated auction; and at the auction, the auctioneer knocked off several lots to Mr. John Minet Fector, one of the firm of Fector & Minet, and put down the initials, J. M. F., meaning John Minet Fector. About two weeks after, the defendants wrote to Fector & Minet, approving the purchase. It was held, although the purchase was in the name of the agent (*without designating him to be an agent*), the defendants, the principals, were liable. \*"*The initials of the defendant's agent, [114 written by the auctioneer, coupled with the letter recognizing the sale, was held to constitute a sufficient memorandum, in writing, to satisfy the statute of frauds.*"

In *Western v. Russel*, 3 Vesey & Beames, 187, the court held the letter, offering the land at a specified price, together with an-

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other letter from the same person, expressing himself thus—"I have just received yours, and am glad you have determined to purchase the watering farm, as I think it will be an accommodation to you"—contained a sufficient memorandum; and that, although no letter of acceptance could be proved, it was evident, from the last letter, an acceptance had been made, and that the letters, altogether, sufficiently showed the existence of a contract in writing.

In *Soames v. Spencer*, 2 Dow. & Ry. 32, it appears Soames and one Tennant were joint owners of a quantity of oil. Soames, without any authority from Tennant, sold the oil in *his own name*; but Tennant, afterward (having first refused), confirmed or assented to the sale. It was held that, although the written contract did not name Tennant, and, therefore, did not bind him, yet his subsequent approval was tantamount to his previous authority.

In 4 Bingham, 722, it was held that, where a person made sale of the property of another without authority, and entered into a memorandum, the owner might, by parol, subsequently approve of, and ratify, the contract; and that such subsequent ratification was equal to, and even more satisfactory, than previous authority, because the owner knew what he was ratifying.

In *White v. Proctor*, 4 Taunton, 203, the auctioneer put down the name of *Mr. Stokes* as the purchaser. The defendant's name was not in the memorandum; but he was held liable, inasmuch as Stokes was his agent.

The principles to be extracted, then, from all these cases, are these:

The memorandum, required by the statute, need only be signed by the party to be charged, or by his agent, and that the auctioneer is the agent of buyer and seller.

115] \*That a memorandum, in the name of the agent of the buyer or seller, is equally binding on the principal as though it was in the name of the principal, provided the agent was authorized by the principal.

That this authority may be conferred previous to the sale, or by ratification or recognition after the sale.

That a written memorandum in the name of one party, where the other is *not named*, will be made available by a recognition of the contract by the other party, by letter or paper referring to the sale.



As to the mortgage incumbrances, it is shown they were well known to the bidders; at the time of the purchase the auctioneer mentioned the existence of these mortgages, and the fact that they were held by the banks mentioned as an inducement to purchasers, because he expected the purchasers might obtain further time from the banks.

It is well settled that the existence of incumbrances at the time of purchase is no objection to a specific performance, if they were proclaimed at the sale, or their existence was known to the purchaser. 5 Ves. Jr. 818. So a party will be held to have waived his objections to a title on the ground of an incumbrance, if he treats for the purchase after knowledge of the incumbrance. 3 Meriv. Ch. 64.

Applying these decisions to the present case, there can be no pretense for setting up the mortgage incumbrances as an objection to the specific performance of the contract: First, because the existence of these mortgages was well known at the time of sale; and, secondly, because if not known then, it is clear they were known immediately after the sale, and no objection taken on that account; but, on the contrary, everything was satisfactory except the pending of the creditors's bill to set aside the deed of assignment, and it was agreed to let the matter rest until that cause was decided, and, if the title of the assignees should be sustained, the title would be satisfactory.

\*EDWARD WOODRUFF, for defendant, relied upon the following positions: [116]

1. The proof does not sustain the allegations of the bill.
2. The case is within the *statute of frauds*.
3. That by the terms of the sale the defendant is not bound by his purchase, the title not being clear and indisputable at the time of the sale, nor within *ten* days, nor even at this time.
4. That the circumstances of the sale were such as to show unfairness toward the purchasers—a suppression of the truth—in not disclosing incumbrances and litigation, to which said premises were, and still are, subject.
5. That parol proof can not be introduced by the plaintiff to show anything which transpired subsequent to the sale, for the purpose of creating a new liability on the defendant, not warranted by the original agreement.
6. That there is no mutuality of obligation on the complainant,

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inasmuch as the defendant could not have compelled the complainants to a specific performance.

7. That if any deed was tendered to the defendant, it was not in conformity with the alleged terms of sale, being nothing more than a quitclaim; nor is there any certificate of the official character of the officer before whom the same was acknowledged.

It will be recollected that the complainants alleged that the contract was made by defendant with them; the proof, to wit, the memorandum, shows that *O. Shultz* was the person, if any one could claim the benefit of said memorandum, as his name alone is mentioned.

But it is sought to show by parol that the contract was made with the complainants.

"Parol evidence, which substantially varies a written agreement, is inadmissible *in equity* as well as at law." Sug. Vend. 89, 95.

"Several papers, not referring to each other, can not be connected by parol proof." 1 Johns. Ch. 273; 2 Stark. Ev. 117] \*350, and note 1. "A memorandum of the sale of lands, besides being signed by the party, must contain the essential terms of the contract, expressed with such clearness and certainty that they may be understood from the writings themselves, without the necessity of parol proof; and a written or printed advertisement, containing the conditions of sale, exhibited and read to the purchasers, will not supply the defect." 16 Wend. 28.

If part performance is relied on, where is the proof of it?

It will be recollected that Chesseldine was in possession, *as lessee*, at the time of the alleged sale.

"If the vendee be a tenant in possession, under the vendor, the case is not taken out of the statute, for his possession is properly referable to his tenancy, and not to the contract." 2 Story's Eq. 68.

But it is said that Chesseldine agreed to pay for the expense of removing a wall. The testimony is that he would, if he completed the purchase (see paper attached to S. P. Chase's deposition); and that he agreed to arbitrate the deficiency in the quantity of the land. These acts being merely preliminary, are not sufficient to take the case out of the statute.

"Delivering an abstract; giving directions for conveyances; going to view the estate; *fixing upon appraisers to value stock*;

*making valuations, etc.*, will not take the case out of the statute." Sug. Vend. 72, 73; 2 Story's Eq. 68.

"The purchaser, to be bound, must know the objections to the title *at the time* he purchases." Sug. Vend. 254; 7 Ves. Jr. 265.

"The title must be like Cæsar's wife, above suspicion." Sugden, 210.

"It must be clear of *all suspicion*; no man is obliged to buy a law suit." Sugden, 211; *Butler v. Hear*, 1 Des. 381; *Kelly v. Bradford*, 3 Bibb, 317.

"If no incumbrance be communicated to the purchaser, or known to him to exist, he must suppose himself to purchase an unincumbered estate."

"His objections to taking it need not be confined to cases of \*doubtful title, but may be extended to incumbrances of [118 every description, which may embarrass him in the full enjoyment of his purchase." *Garrett v. Macon*, Call, 303.

"It must be shown, by the party asking for a specific performance, that he has been in no default, in not having performed the agreement; and that he has taken all proper steps toward performance on his part." Story's Eq. 81.

In all cases cited by the counsel for complainants, to show that a sale made in the name of an agent may be claimed by the principal, although the name of the principal was not disclosed, it will be found that the sales were avowedly made by the vendor as agent.

The complainants have also acted carelessly and negligently in the premises, in taking no steps to rid the premises of the incumbrances; and a space of nearly six months elapsed from the time of said sale until a deed was said to have been tendered, the circumstances of the property, in point of value, and other respects, materially changing.

"If the character and condition of the property, to which the contract is attached, have been so altered that the terms and restrictions of it are no longer applicable to the state of things, in such cases courts of equity will not grant any relief, but leave the parties to their remedies at law. Courts of equity will not interfere to decree a specific performance, except in cases where it would be *strictly equitable* to make such a decree." 2 Story's Eq. 53.

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The learned commentator takes a very rational distinction between the case of a plaintiff seeking a specific performance in equity, and the case of a defendant resisting such performance; that the specific execution of a contract in equity is matter, not of absolute right in the party, but of sound discretion in the court. *Hence, it requires a much less strength of case to resist a bill to perform, than to enforce a specific performance.* An agreement, to be entitled to be carried into specific performance, ought to be *certain, fair, and just in all its parts.*" 2 Story's Eq. 79; 6 Johns. Ch. 222; Sugden, 125-135; 3 Cowen, 435.

119] \*All the peculiar circumstances may be shown by the defendants, and greater latitude is given for this purpose, by the introduction of parol proof, than is allowed the complainant. 2 Story's Eq. 80; Sugden, 160.

"Delay on the part of the vendor, is a good ground to refuse a specific performance." 7 Ohio, 92; 2 Story's Eq. 87, and note.

With respect to the attempt on the part of complainants to prove a tender of a deed, even if they have succeeded in proving it, it amounts to nothing. A tender made by a person who is unable to perform his contract, avails him nothing; it is an empty act. 7 Ohio, 88.

The deed which it is said was tendered to the defendant, was only a *quitclaim*. Now, Wright, the auctioneer, and two or three other witnesses, say part of the terms of sale was that a *good and clear* title would be made within ten days, etc.

"A contract to make a *good and sufficient deed* is for a conveyance in fee simple, with *covenant of warranty*.

"A deed without warranty does not fulfill the contract." Wright, 644; 2 Johns. Ch. 613; 2 Greenleaf, 22; Gilchris v. Buie, 1 Dev. & Batt. 356.

Mr. Fox for the plaintiff, in reply:

Objections are made to a specific performance of the contract in this case:

1. Because the proof does not sustain the allegations of the bill. The answer is, the contract, if valid, exactly agrees with that stated in the bill.

2. Because the case is within the statute of frauds. I admit the case to be within the statute of frauds and perjuries.

If we take these two objections together, they amount to this: The contract, in proof, varies from the one set forth, because the

name of Charles Shultz appears in it; and the complainants are prohibited from showing by parol that they authorized the sale, and, therefore, the contract is void by the statute. Mr. Woodruff claims that, to show this sale to have \*been made for the [120 complainants by parol, is to *vary* the written contract. He refers to Sugden, 89, 95; but when we come to look into the authority cited, we find it only shows that another proposition contended for, can not be sustained, viz: that the verbal declarations of the auctioneer in the auction room, *contrary to the printed conditions of sale*, are inadmissible.

Mr. Woodruff is mistaken in supposing that in all the cases cited by myself, to show that a sale made in the name of an agent may be claimed by the principal, although the name of the principal was not disclosed, the sales were avowedly made by the *vendor, as agent*. So far from this being the case, in the case of *Soames v. Spencer*, 1 Dow. & Ry. 32, Soames sold the oil *in his own name*, without any authority, even from Tennant. The case in 4 Bingham, 722, is to the same effect. In *White v. Proctor*, 4 Campbell, 210, Mr. Stokes was put down as the name of the purchaser. Stokes was, in fact, the agent of Proctor. But the name of Mr. Stokes, *only*, was put down as purchaser, and not as agent for the purchaser; and Proctor was held liable on the contract made in the name of Stokes. So in the case of 3 Taunt. 168, and in 3 Ves. & Beames, 187, the names of buyer and seller were not on the same paper, but the contract was made out by different letters.

In *Hicks v. Hankin*, 4 Espinasse, 114, the contract was made in the name of George Hankin, although it was, in fact, made by Joseph Hankin, who was acting as agent for George.

Again, suppose it were as Mr. Woodruff supposes—that the name of the person making the sale was mentioned as *agent*—would this make the contract any more certain, without the aid of parol testimony? To sign the name merely as *agent*, without saying *for whom* the party was acting as agent, would still require the aid of parol testimony to show who was the principal.

But the law is unquestionably settled that the mere concealing the name of the principal, whether buyer or seller, will not prevent the principal being made liable when discovered. "The buyer or seller may resort to the principal when \*discovered, although [121 his name were *not disclosed at the time of the contract*." *Patterson v. Gaudaseino*, 15 East, 62.

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So, where two are jointly interested in property, and one only sells it, without any authority from the other, yet the latter may, by subsequent ratification, enforce the purchaser to comply with his contract. *Soames v. Spencer*, 1 Dow. & Ry. 32. Where a factor sells goods in his own name, and the purchaser does not know the fact that any other person is owner, yet if, before payment, the purchaser receives notice from the principal, and after that pays the broker, the principal may recover (*Ross Vend.* 147, 148,) although the statute of frauds, in regard to contracts concerning personalty, requires the agreement to be signed by both parties.

Where the agent purchases in his own name, the fact of agency may be proved, so as to charge the principal. *Sug.* 121; 1 *Moore*, 46; *Russ. & M.* 53; *Story's Agency*, 28; 5 *Wheat.* 671; *Burton on Real Prop.* 483.

Again, I insist that it is not necessary the complainants should show they had previously authorized the sale; because the name of the purchaser being in writing, and signed by his agent, the subsequent approbation of the sale is just as good as previous authority. In the case before alluded to, 4 *Bing.* 722, Justice Best says: "It has been argued that the subsequent adoption of the contract by *Dunn*, will not take the case out of the operation of the statute of frauds; and it has been insisted that the agent should have his authority *at the time the contract is entered into*. If such had been the intention of the legislature, it would have been expressed more clearly; but the statute only requires some note or memorandum, in writing, to be signed by the party to be charged, or his agent thereunto lawfully authorized; leaving it to the rules of the common law as to the mode in which the agent is to receive his authority. Now, in all other cases, a subsequent sanction is considered the same thing in effect as an assent at the time; and, in my opinion, *the subsequent sanction of a contract, signed by an agent, takes it out of the operation of the statute more satisfactorily than authority beforehand.*"

122] \*As to the objection of uncertainty, it is futile. If we look at the memorandum of the auctioneer, to which is attached the copy of the printed advertisement, it will be seen that it is the property situate at the southeast corner of Main and Lower Market streets; and it is the same property occupied by *Chesseldine*, etc. There is no difficulty in identifying the property, which is the only object of a description.

As to the want of mutuality, there is no weight in that objection; for it is well settled that, if the contract is signed by the party sought to be charged, it is sufficient. The statute does not require that the contract should be signed by both parties. Sug. Vend. 43, 45. Even a letter directing a third person to draw an agreement, mentioning the terms, is sufficient. Sug. 45, 50. But if such was the requirement of the statute, the auctioneer is agent, as well for the seller as the buyer, and, of course, his act would bind the vendors, as well as the vendee. 4 Johns. Ch. 666.

As to the tender of the deed, I consider it immaterial. It is evident that, at that time, these purchasers refused to receive it. But as the tender is said to be denied in the answer, and only proved by one witness, it may be as well to remark that the bill does not call for a discovery; the answer, therefore, is not made evidence by complainant, and it can not be made so by the defendant.

It is said, however, the deed is only a quitclaim deed, and that the purchaser at an auction sale is entitled to a warranty deed. Whether a purchaser is entitled to a warranty deed depends upon the contract of sale. Now, there is no stipulation for a warranty deed; and, I take it, a court of chancery will not decree a specific performance, even with a warranty deed, unless the title is good. So far, therefore, as the form of the deed is concerned, it is immaterial. If this court think the party entitled to a warranty deed, they can now decree one to be made. If a warranty deed had been tendered, it would avail nothing against a bad title. Was this a bad title at any time? The counsel for defendant speak of this as an admitted bad title. Now, it is not pretended there was any defect at all, save and except some creditors had seen [123 proper to file a bill, and, without any proof whatever, charge the trust deed to be fraudulent. But I submit to the court, whether that circumstance is to be considered as any evidence of a defective title. If I understand what is such a defective title as to prevent a specific performance, it is a title where there is a link wanting in the chain, or where some manifest equitable title is existing, and this must be proved to the court. "It is not sufficient to show that the title has been deemed insufficient by conveyancers, but he must prove the title bad." Sug. 157. It is only where there is a *substantial defect* the defense can avail. 2 Story Eq. 89. And, although a vendor is not bound to take a doubtful title, he

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will not be permitted to object to a title on a mere probability of a defect. Sug. 214.

As to the question of the warranty deed, I take this to be the law: A covenant, to give a good and sufficient deed for the premises, is complied with by giving a good and formal deed, without covenants of warranty. Such is declared to be the law in 16 Johns. 269; 12 Ib. 442.

Wood, J. There has been a mass of testimony taken in this case, too voluminous to be recapitulated at length, and will only be referred to in general terms in the disposition of the case. In this class of cases it is well settled that the auctioneer is the agent of both parties, and that sales of this description must be conducted in the utmost good faith; and the bidder, as a general rule, has the right to rely on the printed conditions, or verbal representations made by the auctioneer; and if they are not substantially true, it is a fraud upon the purchaser, and he is not bound by his bid. It is also true that a court of equity looks beyond the letter, and inquires after the intentions of the parties. Charles Shultz was, at one time, the owner of this property, and had assigned it to the complainants for the benefit of his creditors. At this time of the sale, and before and after he purchased, Chesseldine occupied it under a lease from the complainants, as assignees, and paid the rents occasionally to Charles Shultz. He 124] must, \*therefore, have known to whom it belonged, and that Charles Shultz was acting as the agent of the complainants in the management of the premises; and looking, then, at the transaction in its *real* light, equity would regard the contract as between the complainants and defendant, notwithstanding the auctioneer erroneously made Charles Shultz a party. The correction of mistakes is one of the peculiar jurisdictions of a court of equity. It appears to us, also, the memorandum of the sale, signed by the defendant, through the agency of the auctioneer, if we regard the complainants as the real parties, takes the case out of the operation of the statute of frauds.

It is certain the property was incumbered at the time of the sale by the mortgages referred to, and until the July term of the superior court succeeding, and that a suit was pending in favor of certain creditors of Charles Shultz against the complainants, as his assignees, to set aside the assignment of this property; but at



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the July term, by consent of the Bank of the United States, the creditors and assignees, such proceedings were had that the title was confirmed in the assignees, and the avails of the property disposed of by the decree, leaving it perfectly in the power of the assignees to make a good title. It is very clear if Chesseldine had chosen to abandon the purchase, at any time after the ten days had elapsed, in which the title was to be made, his right to do so could not have been questioned. But if he chose, on his part, to consider the contract open, and to waive the limitation, within which the complainants were to convey, and until it was in their power, equity will estop him from afterward setting up their default as a defense to the suit.

If he treated the bargain as open and subsisting until the bill was filed, and the complainants were able to make a good title at the hearing, performance, on the part of the defendant, will be decreed. 2 P. Wms. 630; 1 Atk. 12; 3 Cow. 445, 555. It is also certain if the printed conditions of the sale, or the representations made, are not true, the purchaser may waive his right to abandon the contract, and he will, in that event, be compelled to perform it. Does not the defendant occupy this ground? [125 Griffin Taylor swears that the defendant offered to sell him the property three or four weeks after the purchase. Fox says before he commenced this suit, which was on November 25, 1839, he had several conversations with Chesseldine. He at first expressed a willingness to take the property, but at last objected to the title, and in October, or early in November, deponent tendered him the deed of the complainants. It is proved by Mr. Chase that in June or July the defendant agreed to pay for one-half of a partition wall, to separate the premises in controversy from those of the deponent, in the event of his completing the purchase. There are other facts also in proof, which altogether lead us to the conclusion that the defendant intended to take the property until about the time when the deed was tendered, in October or November, long after the title was complete in the assignees, and the cause of his refusal was then, probably, not so much from any objection to the title as the depreciation in the value of real estate, which is shown to have been at least twenty-five per cent. from May till October, 1839.

Another ground of defense is, that the complainants' deed was but a *quitclaim*, which the defendant was not obliged to receive.

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Whether this was a compliance with the contract, on the part of the complainants, must depend on its terms. The contract was for a *good title*. If, then, the assignees had the title, it would pass to the defendant by a *quitclaim*, as well as by a conveyance with covenants of warranty. The form of the conveyance, under such a contract, can not be material. The court will look to see if a good title is conveyed, and if not, whatever may be the form, the vendee will not be decreed to execute the contract, on his part. This deed, however, does contain covenants of warranty, by the assignees, against their own acts; but without even these covenants, a majority of the court would consider this conveyance sufficient to satisfy the terms of the sale. Decree for complainants.

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## 126] \*THE STATE OF OHIO v. THE MIAMI EXPORTING COMPANY.

A plea that the defendants have, for twenty years, exercised the franchise which they are accused of usurping, is valid under the statute.

No arguments came to the reporter.

LANE, C. J. This is an information in the nature of a *quo warranto*, averring that the defendants use, without warrant, grant, or charter, the following franchises:

1. Of being a corporation.
2. Issuing notes, and receiving deposits, making discounts, and carrying on banking operations.
3. "Of becoming the proprietor of a fund of gold and silver, and keeping the same in a banking house."
4. Issuing notes for circulation, more than three times the amount of it.
5. Receiving money as capital and loaning, in notes and money, more than the amount, to its pretended officers.
6. Issuing notes for circulation, payable in notes of other banks.
7. Loaning such notes in the same manner as bank notes, payable on demand.

Process is, therefore, asked to bring them into court, to show by what warranty they exercise these franchises.

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The pleadings are prolix. It is only necessary to notice the fifth plea. It is there averred, that the defendants were duly incorporated in 1803, and were, by the act of incorporation, duly authorized to exercise all the franchises specified in the declaration, and have exercised, all and singular, the specified franchises for the term of more than twenty years.

The prosecutor replies to the first part of this plea, which is, substantially, setting up a title by prescription, that they have exercised privileges not conferred by charter, to wit, they issued notes to circulate as money. To the same part of the \*same [127 plea, he further replies, that they did not pay their notes and other contracts; and, as to the residue of the same plea, he demurs, for want of form, and assigns as reasons, that it contains matters of law, instead of matters of fact; that no compliance with the provisions of the act is shown; nor, because it does no show by what authority they loaned to themselves more than \$200,000 over the amount of the capital stock, or by what authority they have taken more than six per cent. interest.

The defendants join in this demurrer.

It is difficult to speak in any terms of seriousness upon the style of pleading which the prosecutor is pleased to adopt. Let us endeavor to approach the real question, as far as we are able to find it.

The act relating to *quo warranto* declares no proceedings shall be had to question the authority for exercising franchises which have been exercised more than twenty years, provided such proceedings shall not be barred if instituted within two years from the passage of the act.

The defendant relies, in this plea, upon the prescriptive right of twenty years. The prosecutor, instead of either denying the exercise of the franchise for this period of time, or of bringing himself within the two years' proviso, gives no other answer, except to repeat the averment that the defendant has done those things which he claims a right to do under his plea.

Without noticing, therefore, the other parts of the case, the plea seems to furnish a complete defense. Judgment for defendant.

## 128] \*THE BANK OF CLEVELAND v. WARD, SMITH, ET AL.

The power to change the venue rests in the sound discretion of the court, and must depend upon the circumstances of each particular case.

The venue should not be changed on the affidavit of the party alone, but only upon clear and satisfactory proof that fair and impartial justice probably can not be obtained in the county where the suit was commenced.

WOOD, J. This is a motion, filed by the plaintiff, to change the *venue*, in this case, from the county of Cuyahoga to the county of Geauga, for trial. The reason on which it is sought to sustain this motion is, that the cause of action has been so long and so publicly discussed, and has become so much a subject of general interest in the county of Cuyahoga, that a fair and impartial trial can not be had therein.

In support of this motion, the affidavit of Zalmon Fitch, president of the bank, is submitted. He deposes that a *fair and impartial* trial can not be had in *Cuyahoga county*, as he *verily believes*. The inquiry is, whether, from the evidence before us, this is a motion which should be granted *of course*, on the affidavit of the party; for nothing else, as connected with this case, has come to the knowledge of the court, to induce the belief that *fair and impartial justice* is not to be obtained in the county where the suit was commenced.

We have no settled rule of practice on the subject, and it would, perhaps, be difficult for any one to be *precisely* defined; but such a motion must, of necessity, rest in the sound discretion of the court, *under the peculiar circumstances attending each individual case*.

In New York, in ordinary cases, the courts exercise the power of changing the venue, to accommodate the party who has a majority of witnesses residing in another county, under certain limitations. But when the motion is based upon the ground of *excitement*, it is said that when it is found that a fair trial, or *no trial at all* could be had, the motion should be granted. This was the 129] case of *Messenger v. Holmes*, 12 \*Wend. 203, in which the court refer to the case of *Bowman v. Ely*, 2 Wend. 250. In the latter case, a motion was made to change the venue from Oneida

to Monroe, the residence of most of the witnesses; the motion was opposed by the production of the affidavits of several disinterested and respectable individuals, that, from their knowledge of the excitement which prevailed in Monroe, a fair trial could not be had in that county.

The court decided not to interfere, on any speculative opinion of individuals; that they ought *first* to see whether the apprehensions of the party were realized, and there would then be time to interpose, and cause the course of justice to flow unpolluted by passion or prejudice.

The power to interpose and change the venue in this state, is derived from section 134 of the practice act (Swan's Stat. 684), which provides "that, in all cases where it shall be made to appear to the court that a fair and impartial trial can not be had in the county where the suit is pending, the court may direct the venue to be changed." It appears to us that more confidence is due to the not less than five thousand legally qualified jurors in the county of Cuyahoga, than to suppose a fair trial can not be had there, merely upon the speculative opinion of one individual, and be a party in interest in the cause; and there is nothing else in the case to induce such belief. There is nothing in the cause of action calculated to raise an excitement, or general feeling, for the matters in controversy are *five promissory notes*. The record shows there has been but one attempt at a trial by jury, and it is a fact within our recollection, upon that trial, and of which we must take judicial notice, that no difficulty occurred in the selection of the jury, though they were unable to agree, and were discharged by the court; and, under the proof in the cause, such disagreement might have happened in any other county in the state.

As before remarked, it is difficult to establish any general rule, applicable to all cases of this kind; but it is nevertheless certain that the defendants should not be subjected to the vexation and expensé of trying their case in a distant county, be- [130 cause the plaintiff, alone, entertains the opinion that justice can not be administered at home. Either party has a right to a struck jury, if application is made; and in a populous county, until even *that* effort is tried, the court should not interfere, without other most clear and satisfactory proof of the necessity, to the fair and impartial administration of justice, that the place of trial should be changed. Motion overruled.

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Rockwell v. State of Ohio, etc.

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**JAMES ROCKWELL v. THE STATE OF OHIO, FOR THE USE OF JOHN NEVINS.**

In a suit under the act of 1839, against the officer of a bank, for refusing to indorse its bills on presentment, it is necessary to aver, in the declaration a general suspension, by the bank, of specie payments.

Section 13 of the act of 1839 does not impair the charter of the Bank of Cleveland.

Debt is the proper remedy for the penalties imposed by the act.

THIS is a writ of error to the court of common pleas of the county of Cuyahoga.

A suit was brought before a justice of the peace, by the defendant in error, against the plaintiff, and, by an appeal, removed into the court of common pleas of the county of Cuyahoga, where a declaration was filed, containing but one count, in which the plaintiff below averred that the defendant below was indebted to the said plaintiff, etc.; for that whereas, the Bank of Cleveland, being a banking institution, duly chartered and incorporated, etc., and transacting the business of banking at Cleveland, on Decembor 1, 1834, did then and there make and execute its certain promissory note, in writing, to R. Winslow, and thereby promised to pay the said Winslow, or bearer, on demand, five dollars; and [131] \*whereas, the said note afterward, to wit, on, etc., in due course of business, duly came into the hand of the said John Nevins, for whose use the suit is brought; and whereas, the said John Nevins being the bearer of said note, then and there, to wit, at the banking house of the Bank of Cleveland, on, etc., and within the usual business hours of said bank, presented said note at the counter of said bank, and demanded payment thereof, in specie, of the said James Rockwell, who, then and there, was an officer of said bank, to wit, the cashier thereof, which payment the said James Rockwell, cashier as aforesaid, then and there *refused*; and, whereas, the said John Nevins then and there requested the said James Rockwell, as such cashier, to *indorse* said *demand* and *refusal*, together with the date thereof, in writing, upon the back of said note, and to subscribe the same as such cashier; he, the said James Rockwell cashier as aforesaid, then and there did not, nor would

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he, so indorse said note, but wholly neglected and refused so to do, whereby, and by force of the statute, the said Rockwell forfeited to the said State of Ohio, for the use of the said Nevins, the sum of fifty dollars, whereby an action hath accrued, etc. To this declaration the defendant below demurred generally. The demurrer was overruled in the common pleas, and, by leave of the court, the general issue of *nil debet* pleaded, the cause submitted to the adjudication of the court, and judgment given for the plaintiff below for five dollars, and costs of suit.

The only error assigned, necessary to notice specially, is, "that the declaration, and the matters therein contained, are not sufficient in law to maintain the said action."

BENEDICT, ALLEN and STETSON, for the plaintiff in error, insisted that the charter of the Bank of Cleveland is a contract within the meaning of section 10 of article 1 of the constitution of the United States, and so not subject to repeal or alteration. *New Jersey v. Wilson*, 7 Cranch, 164; *Terret v. Taylor*, 9 Cranch, 43; *Trustees of Dartmouth College v. Woodward*, 4 Wheat. [132 518; *Nichols v. Bertram*, 3 Pick. 343; *Armstrong v. Treasurer of Athens County*, 10 Ohio, 239.

No argument for the defendant came to the hands of the reporter.

WOOD, J. This suit is instituted under the provisions of section 13 of the act of the general assembly of this state, for the appointment of a board of bank commissioners, and for the regulation of banks, etc., passed on February 25, 1839.

This section enacts that, "if any banking institution in this state shall hereafter suspend the payment of its notes in gold and silver, it shall be the duty of the cashier, whenever any bill or bills shall be presented at the counter of said bank, and the redemption thereof demanded in gold and silver, and the same be refused, to indorse such refusal and the date thereof, on the back of such bill or bills; and if any cashier shall refuse to indorse any such bill or bills, according to the provisions of this act, such cashier shall forfeit and pay a fine of not less than five nor more than fifty dollars for every such bill so presented and refused, to be recovered before any court having jurisdiction, in the name of the State of Ohio, for the use of the person or persons aggrieved."

This is a penal statute, and must be construed strictly; and it

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is, therefore, necessary all the circumstances should be stated, which are provided to bring the cashier within its provisions, or the judgment can not be sustained. If there be a title to recover, defectively set out, such defects are cured by the judgment; but if the title itself to recover, as spread forth in the declaration, be defective, the judgment should be reversed.

The law, then, provides that if any banking institution in this state shall hereafter suspend the payment of its notes in gold and silver, it shall be the duty of the cashier to indorse, etc. It is to guard against a general suspension, or the suspension of the payment of its notes generally by the bank, \*that the act confers upon the holders of its bills the authority to require this indorsement, and inflicts the penalty for a non-compliance; it was never the intention of the law to give the penalty upon an *isolated controversy* between an officer of the bank and the holder of a bill, which resulted in a demand of payment, and refusal to pay or indorse. Such a transaction would hardly be worthy of legislation and the bill holder is left to his remedy, by action, for the recovery of his debt. But to prevent a general suspension of the payment of its notes, which affects the whole community, the provision was made. Are, then, such facts set forth as bring the cashier within the spirit or meaning of this act? If any banking institution shall suspend the payment of its notes, says the law. The pleader has not averred the suspension of the payment of its notes, but that the plaintiff below presented a single bill, and payment was refused. This averment is, in our view, insufficient to sustain this judgment, and it must be reversed.

It has been suggested, also, that debt is not the proper remedy in this case, the penalty being uncertain, resting in the sound discretion of the court, between five and fifty dollars; and, as a general rule, debt lies only for a sum certain. We think, however, that debt is the proper remedy, and it is within the knowledge of the court that debt has been frequently brought in analogous cases, and is given by express provision in some other cases precisely similar.

But a claim still more extraordinary is advanced by the counsel for the plaintiff in error. It is, that as the charter of the bank contains no requisition upon the cashier to indorse in such cases, the law imposing this additional obligation impairs the charter, and is unconstitutional. It would be useless to discuss that sub-



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ject, in this case, any farther than to remark, that the charter of this institution provides that the legislature may, at any time thereafter, enact laws enforcing and regulating the recovery of the notes, bills, or debts, of which payment shall be refused, etc.; and the act, under which this suit was instituted, seems to be in direct pursuance of this provision. Judgment reversed.

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**\*FESTUS McVEY ET AL. v. THE OHIO UNIVERSITY. [134**

Under the act of 1804, establishing the Ohio University, and the act of 1805, amendatory thereto, the lands of the university, on lease, are subject to revaluation.

THIS is a bill in chancery, from the county of Athens.

It comes before the court upon a demurrer to the bill.

The facts, as set forth in the bill, are as follows: The United States, in 1792, in granting to the Ohio Company the lands by them purchased, reserved within the territory granted two townships of land, for the purpose of endowing a university; and, subsequently, by resolution of Congress, the legislature of Ohio were intrusted with the management and application of this fund.

On February 18, 1804, the legislature of Ohio passed an act incorporating the Ohio University, in the town of Athens, now in the county of Athens, and which is within one of the reserved townships. By this act the two reserved townships were vested in the corporation, in trust, for the sole use, benefit, and support of said university forever. In section 12 of the act the trustees are directed, by the oaths of three judicious and disinterested freeholders, to lay off the land in said township, or such part thereof as they may deem expedient, into tracts of not less than 80 nor more than 240 acres, and to estimate and value the same as in their original and unimproved state. They are further authorized to lease the said land for the term of ninety years, renewable forever, on the yearly rent of six per centum on the amount of the valuation so made by the freeholders. The statute then goes on to provide that "the land so leased shall be subject to a revaluation at the expiration of thirty-five years, and to another revalua-

tion at the end of sixty years from the commencement of the term of each lease, which revaluation shall be made and conducted on the principle of the first; and the lessee shall pay a quarterly rent [35] of six \*per centum per annum on the amount of the revaluation so to be made; provided, always, that the said corporation shall have power to demand a further yearly rent on said lands and tenements, not exceeding the amount of the tax imposed on property of like description by the state."

On February 21, 1805, an act was passed by the legislature, amendatory of the act of 1804, by which among other things, it is provided that James Denney, Emanuel Carponter, Jr., Isaac Dawson, Pelatiah White, and Ezekiel Deming shall appraise said college lands, at the then real value in an uncultivated state, and make report thereof to the board of trustees of said university; and the trustees are authorized to lease the same to any person, agreeable to law, for the term of ninety-nine years, renewable forever, with a fixed annual rent of six per centum on the appraised valuation, provided that no lands shall be leased at a less valuation than at the rate of one dollar and seventy-five cents per acre. And it is further enacted, that so much of the act of 1804 as is contrary to this act, be and the same is hereby repealed. On November 24, 1804, the trustees (the land having been first appraised), leased to one Robert Ross, 240 78-100 acres of this land for ninety-nine years, renewable forever, he paying the annual rent of \$25.57. In this lease no provision is made for a reappraisal, but the acts of 1804 and 1805 are referred to as conferring power on the trustees to make it. By sundry assignments and conveyances, the property covered by the lease is now vested in the complainants, and they are chargeable with the rents. It is charged in the bill, that at the time of the passage of the amendatory act, at the time of the execution of the lease, and up to the time, or nearly so, of the filing of the bill, it was the understanding of the lessors and lessees, and all concerned, that the provisions of the law of 1804 were repealed by the law of 1805, and that there was to be no revaluation of the leased premises.

The bill then charges, that at the last session of the board of trustees (contrary to all that had been before by them held), the trustees declared and resolved, and still pretend and claim, [36] \*that said premises, and all the lands in said township, except in the town of Athens, are subject to revaluation, and the de-

mand of additional rent, agreeably to the provisions of the act of 1804, and that the corporation threaten to revalue said lands, and demand and assess a rent of six per centum upon said revaluation, and also a further rent, in addition thereto, equal to the state taxes on said land; and that in case of non-payment, they threaten to re-enter, avoid the lease, and repossess themselves of said land.

The prayer of the bill is, that the corporation may be enjoined, and the complainants may be quieted in their possession, and for general relief.

WELCH, for the complainants.

EWING, STANBERRY & HUNTER, for the defendants.

HITCHCOCK, J. The question which is presented to the court for consideration, in this case, is within a very narrow compass. It depends entirely upon the construction of the act of February, 1804, "establishing a university in the town of Athens." Swan's L. L. 226; 2 Ohio L. 193, and the act amendatory thereto, passed February 21, 1805, Swan's L. L. 232.

Other questions are argued by complainant's counsel, but they do not properly arise in the case. Whether any provision was made in the lease for a revaluation is a matter of no consequence. The lessors refer, in the lease, to the law under which they act, as the authority conferring upon them the power to make the lease, and it was incumbent upon the lessee to know the extent of this authority. Unless the lease was in conformity with the law, it was one which the trustees had not power to make, and the complainants' title would fail. The complainants can not avail themselves of the allegation of having purchased without notice, for they are bound to be acquainted with the title under which they claim.

\*By the act incorporating the Ohio University, the trustees [137 are required to have the lands, with which they were intrusted for the benefit of the institution, appraised by three freeholders; and they are authorized to lease these lands, reserving a rent of six per centum per annum.

This act further provides that the lands shall be subject to revaluation at the end of thirty-five, sixty, and ninety years, and that the lessee shall pay a yearly rent of six per centum per annum upon the revaluation so made. And, further, that the corporation shall have power to demand a further yearly rent, not

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exceeding the amount of the tax imposed by the state on property of the like description. The same act declares that the lands themselves shall be free from taxation by the state.

The amendatory act of 1805 empowers certain individuals therein named to appraise the lands, and authorizes the corporation to lease them for ninety-nine years, renewable forever, reserving a *fixed* rent of six per centum per annum; prohibiting, however, the leasing of any land which shall not have been appraised as high as \$1.75 per acre; and it repeals so much of the former law as is contrary to this.

If, then, we can ascertain wherein the two acts differ, or wherein the latter is contrary to the former, we ascertain to what extent the former is repealed.

By the act of 1804, the lands were to be appraised by three freeholders; by that of 1805, by five individuals named in the law. In this particular there is a difference.

By the former law the land was to be leased for ninety years, renewable forever; by the latter, for ninety-nine years, renewable forever. Here is another difference.

By the former law, the trustees were authorized to lease all the lands; by the latter, only such as should be appraised as high as \$1.75 per acre; and here is another difference.

The two laws are contrary, the one to the other, in the mode of appraisal, in the duration of the lease, and in the quantity of land [138] to be leased. To this extent the former was repealed. \*We have sought in vain for any other matter in which they conflict. It may have been the intention to have repealed all that part of the former law which related to the valuation and leasing of the land. But such intention can not be gathered by any known rule of construction, and, of course, we are not authorized to declare that such effect is produced.

The demurrer will be sustained, and the bill dismissed, at the costs of the complainants. Bill dismissed.

## LESSEE OF BLANCHARD v. PORTER, COLLINS, ET AL.

Land on the Ohio river, lying between high and low water mark, is not common to the public, but may be conveyed by the adjacent proprietor, whose land bounds on the river.

THIS is an action of ejectment, on an agreed statement of facts, from Brown county.

It was agreed as follows:

"1. That the plaintiff and defendants claim under one George Poage, whose title covers the premises in controversy.

"2. That the deed from the said Poage to the lessor of the plaintiff, dated October 19, 1838, includes the slope of the bank of the Ohio river, from low-water mark to the top of the bank.

"3. That the deeds from said Poage, to the defendants, dated May 20, 1834, cover the ground to the top of said river bank where the deed to the plaintiff is bounded; and that said deeds to the defendants, 'save and except, and expressly reserve the break and slope of the bank of the river, and all ferries, and rights to have a ferry.'

\*"4. That the deed from said Poage to John G. Bacon, dated [139 February 8, 1833, grants to said Bacon a right of ferry across said river, from Ferry street to the mouth of Red Oak, between which two points, the slope of the bank in controversy lies.

"5. That, in 1832, the defendants erected on the top of the bank, and within the bounds of their deeds, a steam saw-mill, and constructed, from said saw-mill, a logway, composed of timber, extending a short distance along the top of the bank, and then across the slope of the bank in question, obliquely, to the Ohio river.

"That, since that time, said logway has remained, and, with some little alterations, has been, and is now, used and occupied by the defendants for the purpose of drawing logs from the Ohio river up to said saw-mill. That the defendants, for the purpose of getting their lumber from said saw-mill to the Ohio river, have cut down the slope of the bank, and have constructed suitable fixtures thereon, for the purpose of hauling their logs from the river, and building flat-boats, etc., in which manner they are now

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occupying the said slope of the bank, embraced in plaintiff's deed.

"It is also agreed that said logway passes partly across the mouth of one of the streets in the town of Ripley, and that said slope of the bank, in controversy, is suitable for the construction of warehouses, etc., by digging down the same.

"Third specification, so far as it refers to the deeds to the defendants, leaves the construction of said deeds to be decided by the court."

HAMER and DEVORE, for plaintiff:

The facts in this case are agreed by counsel, and, it is conceived, there can be but little difficulty in determining the rights of the parties. The plaintiff's deed, dated October 19, 1838, covers all the soil, from the top of the bank to low-water mark, on the margin of the Ohio river. No other conveyance interferes with [140] his right to the land in controversy. The \*defendants' deed conveys the soil *to the top* of the river bank, and reserves the "break and slope," between that point and the river. The deed to Bacon conveys a ferry-right, but does not interfere with the "soil and freehold" of the plaintiff. The most that Bacon could claim would be an easement; the right to embark and disembark his passengers at suitable places along the shore, between Ferry street and the mouth of Red Oak creek. This is neither an outstanding title, nor a previous conveyance of the premises in question.

Do the defendants occupy the lands of the plaintiff? If so, by what authority? Is this occupancy consistent with the rights of the plaintiff? Determine these questions, and the case is settled.

In regard to the first, there can be no doubt. It is admitted that they have a saw-mill on the top of the bank, and a logway reaching from the mill to the edge of the water, supported by permanent fixtures upon the soil. The whole slope of the bank is in their exclusive possession. It is a permanent, durable structure, built upon the soil of the plaintiff, and used, continually, for drawing up logs from the river to the mill. It is an appropriation of the slope of the river bank to their own use and benefit, which excludes the plaintiff, and all others, from the enjoyment of this portion of it, in any manner whatsoever. In addition to this, they have dug down the bank at another point, and established a

yard for building boats. By what authority is this appropriation made? Not by their deed, for it does not reach beyond the "break" of the river bank. Not by prescription; for the occupancy is too recent in its origin, and the facts too well known to allow of that defense. But it is said to be an occupancy under the "ordinance for the government of the territory northwest of the Ohio river," enacted by Congress in 1787. By that instrument, the Ohio river is made a highway, "free and common" to all the citizens of the United States, without any tax, duty, or impost therefor. What is the extent of this provision, and how far does it interfere with the privileges of *riparian* proprietors, as they existed at common law? It simply secures \*to the [141 people of the United States the use of the river as a "highway." It gives them a right to the free and unobstructed navigation of the stream of the Ohio. This right carries with it, as an incident to the grant, the right to land their watercrafts; to load and unload them; to secure them to the shore, by cables or otherwise, at convenient places; and to remain a reasonable time at such places, to accomplish any purpose legitimately connected with the business of navigating the river. But it conveys no right to the public, or to individuals, to dig down the soil of the adjacent proprietors; to remove the rocks and sand from the shore, which are valuable for building; to establish boat-yards; to construct wharves; to erect warehouses; to build logways from the water to mills upon the top of the bank, or to incumber the freehold with permanent fixtures of any description. No such right existed at common law; none such were intended to be given by the ordinance.

Is the occupancy of the defendants inconsistent with the rights of the plaintiff? They are clearly so. The slope of the bank is valuable for various purposes. The defendants have found it so; otherwise there would be no defense in the present action. It is agreed that the land covered by the plaintiff's deed is suitable for the erection of warehouses and other buildings. It lies in front of a flourishing town, Ripley, which is the *depot* for the produce of a fertile country of great extent. The slope is daily becoming more valuable. Suppose it lay in front of Cincinnati, what man would venture to assert that such a tract of land, deeded by the original proprietor to an individual, was common property, liable to be seized and appropriated by any one who chose to occupy it

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with warehouses, steam mills, factories, water-works, or other valuable buildings? Does its location, in front of Ripley, alter the principle? If it were in the country, constituting a portion of a plantation, could that fact change the rights of the owners?

The appropriation of the slope, by the defendants, has excluded 142] the plaintiff entirely from the use of his freehold. His \*grant is, practically, a nullity. The law secures to him that which he has purchased and paid for. The defendants have wrested it from him. His legal title to the premises in controversy is indisputable, derived by a regular, unbroken chain, from the government of the United States. The defendants have wrongfully entered, and forcibly keep the possession. The law has provided a remedy for this wrong—that remedy is the action of ejectment.

In support of the doctrine advanced by the plaintiff's counsel, see 5 Ohio, 495; 5 Wend. 423; 3 Term, 253; 7 Wheat. 59; 14 Mass. 55; 6 Cowen, 677.

No argument for the defendants came to the hands of the reporter.

GRIMKE, J. The deed to Bacon may be laid out of the question as not affecting the present controversy. It purports to convey only an easement. It is not an outstanding title, which interferes with the right of the plaintiff to the soil and freehold. Nor is it a question whether the deed to the plaintiff conveys the land and water to the center of the river, since Virginia only granted the territory on the northern bank of the river to low-water mark, although, by the compact of 1792, between Virginia and Kentucky, a *concurrent jurisdiction* over the river is accorded to Ohio and Kentucky. There is also no question but what the deed to the plaintiff comprehends, within its description, so much of the land as lies between high and low-water mark. The question is, simply, had George Poage capacity to convey to that extent? In other words, is the shore of the river common to the public, or does it belong to the adjacent proprietor?

The Ohio is a navigable river; it would be so considered, even if it were not expressly declared to be such by the deed of cession. This, however, does not determine the question, for there are two kinds of navigable rivers. If we resort to the technical and legal definition of a navigable river, it is that part of the stream only 143] where the tide ebbs and flows. The shore, \*below high-



- water mark, belongs to the public. But grants of lands, bounded on rivers, or upon the margins of the same, above tide-water, carry the exclusive right of the grantee to low-water mark, or, as some of the authorities say, to the center of the stream. None of our rivers, in the western country, are navigable in the technical acceptance of the term. They all fall within the second class. The distinction was originally made in order to define the jurisdiction of the admiralty courts.

In *Arnold v. Murndy*, 1 Halst. 1, it was said that a grant bounded upon navigable water, where the tide ebbs and flows, extended to high-water mark when the tide was high, and to low-water mark when the tide was low, so as to constitute what Lord Coke called a movable freehold. Co. Lit. 48, b. But this opinion does not appear to have been followed anywhere else. In *Cooper v. Smith*, 9 Serg. & R. 26, 32, it was held that the right to the bed of a navigable river, where the tide did not reach, was presumed to belong to the public, while the right to the shore belonged to the adjacent proprietor. And in *Shrunk v. Schuylkill Navigation Co.*, 14 Serg. & R. 74, it was decided that the owners of the soil adjacent to the large rivers, in Pennsylvania, do not own the bed of the river to the center. This appears to have been the settled law in Pennsylvania from a very early period. It has, in some measure, effaced the common law distinction between rivers navigable and not navigable. It preserves the distinction, so far as to declare that the river itself is public property; and it destroys it, so far as to make the land between high and low-water mark the property of the riparian proprietor.

But, in New York, the common-law doctrine has been carried to its utmost extent, and considering all rivers where the tide does not ebb and flow as not navigable, the adjacent proprietor has been deemed to be possessed to the center of the stream. This was so held, in the *People v. Platt*, 17 Johns. 195; *Hooker v. Cummings*, 20 Johns. 90. And, in this last case, it was decided, as a necessary consequence of the doctrine, that the islands in the rivers were the property of the owners of the opposite shores. In South Carolina, a \*rule, similar to that in Pennsylvania, [144 appears from the case of *Executors of Cotes v. Wadlington*, 1 McCord, 580, to have been adopted. It was held that the rule of the English common law, that no river is navigable except where the tide ebbs and flows, is not applicable to that state so as to en-

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title the proprietor of land adjacent to a large river, but which is unaffected by the tide, to hold to the middle of the stream. All the authorities, however, agree in giving the adjacent proprietor so much of the land as lies between high and low-water mark.

It appears to have been an unsettled question, in England, until a late period, whether individuals have a right to a tow-path for towing vessels up and down rivers, and it was not until the case of *Ball v. Herbert*, 3 Term, 253, finally determined that they had not, and contrary to the opinion of Sir Matthew Hale.

But, by banks of the river, in that case, it must be meant the lands above high-water mark; otherwise it would overturn the common-law distinction between rivers navigable and not navigable, for it was admitted, in that case, that the Ouse was a navigable river where the tide ebbed and flowed.

All the authorities, however, as I before remarked, concur in giving the adjacent proprietor a right to the land between high and low-water mark in rivers which are unaffected by the tide. The plaintiff is, therefore, entitled to judgment.

Judgment for plaintiff.

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\*JAMES CRAWFORD v. C. C. WOLCOTT.

Where statutory damages are claimed upon a protested bill, it is for the jury to find those damages, and not for the court to assess them, or add them to the verdict.

THIS is a writ of error, to the court of common pleas of the county of Jefferson.

The original suit was brought by the indorsee of a bill of exchange against the drawer. The declaration alleges the bill to have been made at Steubenville, Ohio, and that it was duly presented, for payment, to Force, the acceptor, at Pittsburg, and payment refused. The case was tried by a jury, who returned a verdict for \$4,070, the amount of principal and interest of the bill. The record then states "that it appearing to the court, here, by testimony in the case, that the said bill of exchange was drawn by the said defendant, at Steubenville, to wit, within the State of Ohio, and that the said bill of exchange was, by said defend-

ant, addressed to and accepted by the said William Force, which said William Force, at the time of the said drawing and acceptance, was resident at Pittsburg, in the Commonwealth of Pennsylvania, to wit, without the jurisdiction of the State of Ohio, and that said bill of exchange has been duly protested for non-payment thereof." The court thereupon proceeded to render judgment for the amount so found by the verdict, together with the further sum of \$240, being six per centum damages on the amount due, and also for costs, etc.

R. MARSH, for plaintiff in error.

STANTON & PECK, for defendant in error.

LANE, C. J. The right to the damages assessed by the court below depends upon the facts that the bill was drawn on some person out of the jurisdiction of this state, and within \*the [146 United States, and that it was protested. These facts may be contested, and the jury must determine them. It is not like the case of damages given on appeals to the Supreme Court, where the court, in certain cases, are required "to render judgment for the amount so recovered, together with five per centum damages thereon." Swan's Stat. 689. But these damages compose a part of the amount due on the bill. They are given as an adjustment of all claims for expenses and re-exchange, and, like the principal, interest, and costs of protest, should be found by the jury and embraced in the verdict.

The judgment was reversed, as to the damages assessed by the court, and affirmed as to the residue.

# CASES

ARGUED AND DETERMINED IN THE

## Supreme Court of Ohio,

IN BANK,

DECEMBER TERM, 1842.

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PRESENT:

EBENEZER LANE, CHIEF JUSTICE.  
REUBEN WOOD,  
MATTHEW BIRCHARD, } JUSTICES.  
NATHANIEL C. READ, }

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[MEMORANDUM.—MATTHEW BIRCHARD was appointed in place of Judge HITCHCOCK, whose term of office expired. NATHANIEL C. READ was appointed in place of Judge GRIMKE, resigned.]

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### THE ADMINISTRATORS OF ISAAC PERRIN v. THE PROTECTION INSURANCE COMPANY.

In an action on a policy of insurance, it is no defense to show that the loss was occasioned by negligence in the agents of the insured.

A loss of a steamboat, by explosion of the boiler, is covered by the policy.

A new trial will not be granted on the ground of newly discovered evidence, where such evidence is merely cumulative.

THIS is a motion for a new trial, from the county of Hamilton.

The suit was brought on a policy to insure one-half of three-eighths of "the hull, tackle, and apparel of the steamboat *Moselle*." The risks described are those of "the seas, \*rivers, [148 fires, enemies, pirates, rovers, assailing thieves, and all other losses and misfortunes which shall come to the damage of the said steamboat, according to the true intent and meaning of the said policy."

The declaration was in the common form, to which the defendants plead the general issue.

At the trial, the interest of the assured, who was master of the boat, and the rights of the plaintiffs, were admitted. It was shown, that during the time covered by the policy, an explosion occurred by which the master and many others were killed and the boat entirely destroyed.

The defense consisted in attempting to show that the loss happened from negligence of the master and hands. A verdict was taken for the amount of the loss, under the direction of the court, and this motion for a new trial is made for the following causes:

I. Because the court did not permit the defendants to ask of experts the following questions:

1. If an explosion can occur when machinery and boilers are of good material, properly constructed, in good order, and skillfully and properly managed?

2. If an explosion arising from no known external cause be not evidence of negligence?

II. Because the court did not instruct the jury that a loss, by the explosion of the boilers from an internal cause, is not covered by the policy.

III. From newly-discovered evidence.

WRIGHT, COFFIN & MINER, and H. STARR, for defendant, in support of the motion for new trial:

Upon questions of science or trade, or others of the same kind, persons of skill may speak, not only as to facts, but are allowed, also, to give their opinions in evidence. 1 Phil. Ev. 209.

\*Mr. Greenleaf, in his late valuable treatise on Evidence, [149 lays down the same principle, thus: "On questions of science, skill, or trade, or others of the like kind, persons of skill, sometimes called *experts*, may not only testify to facts, but are permitted to give their opinions in evidence."

Thus, the opinions of medical men are constantly admitted, as to the causes of diseases or of death, or the consequences of wounds, and as to the sane or insane state of a person's mind, as collected from a number of circumstances, and as to other subjects of professional skill. And such opinions are admissible in evidence, though the witness formed them, not on his own personal observations, but on the case itself, as proved by other witnesses on the trial. But when scientific men are called as witnesses, they can not give their opinions as to the general merits of the case, but only their opinions upon the facts proved. Greenleaf's Ev. 489.

*Folkes v. Chad*, 3 Doug. 157; 26 Eng. Com. L. 63, is a leading case upon this subject. The trustees for the preservation of Well's Harbor, being of opinion that a bank, which had been erected above twenty years, for the purpose of preventing the sea overflowing some meadows, which had descended to the plaintiff, contributed to the choking and filling up of that harbor, by stopping the backwater, threatened to cut it down; on which, the plaintiff applied to the court of chancery for an injunction. The court directed an action of trespass to be brought, to try whether the mischief the bank did to the harbor was a justification for the cutting, that thus the merits of the case might be decided by a jury. At the trial, the plaintiff called Mr. Smeaton, an eminent engineer, to show that, in his opinion, the bank was not the cause of the mischief. It was objected that this evidence was matter of opinion, and Gould, J., who tried the cause, rejected it, and the defendants had a verdict.

On a rule for a new trial, Lord Mansfield said: "The facts in this case are not disputed. In 1758, the bank was erected, and, 150] soon afterward, the harbor went to decay. The question \*is, to what was this decay owing? The defendants say, to the bank. Why? Because it prevents the backwater. That is matter of opinion. It is matter of judgment, what has hurt the harbor.

"Mr. Smeaton's opinion was deduced from facts not disputed; the situation of banks, the course of tides and of winds, and the shifting of sands. His opinion, deduced from all these facts, is, that, mathematically speaking, the bank may contribute to the mischief, but not sensibly. Mr. Smeaton understands the construction of harbors, the causes of their destruction, and how remedied. In matters of science, no other witnesses can be called.

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An instance frequently occurs, in actions for unskillfully navigating ships. The question, then, depends on the evidence of those who understand such matters; and when such questions come before me, I always send for some brethren of the Trinity House. I can not believe that, when the question is, whether a defect arises from a natural or artificial cause, the opinions of men of science are not to be received. I have myself received the opinion of Mr. Smeaton, respecting mills, as a matter of science. The cause of the decay of the harbor is also a matter of science; and still more so, whether the removal of the bank can be beneficial. Therefore, we are of opinion that his judgment, formed on facts, was very proper evidence."

So a shipbuilder may give his opinion as to the seaworthiness of a ship, even on facts stated by others. *Thornton v. Royal Exchange Assurance Co.*, Peake's N. P. C. 25; *Beckwith v. Sydebotham*, 1 Camp. 117.

Persons accustomed to observe the habits of certain fish, have been permitted to give in evidence their opinions as to the ability of the fish to overcome certain obstructions in the rivers which they were accustomed to ascend. *Cottrill v. Myrick*, 3 Fairf. 222.

A practical surveyor may express his opinion, whether the marks on trees, piles of stone, etc., were intended as monuments of boundaries. *Davis v. Mason*, 4 Pick. 156.

\*It seems clear to us, from an examination of the foregoing [151] and other authorities, that the question was a proper one. The opinion asked, it is said, must be upon the facts proved in the cause, or such as are not disputed.

It did not lie in the plaintiffs' mouths to say that the machinery and boilers were not of good material, well constructed, and in good order, or that a crew was not provided, having competent skill and care to navigate the boat. There was an implied warranty to this effect. The facts, therefore, embodied in the question, though disputed by us, in this particular instance of the Moselle, could not be questioned by the plaintiffs; they were bound to show them affirmatively. We had a right to assume them. But can a boat, having all these prerequisites, explode, with a gunpowder explosion, without some particular act of negligence? It is difficult, perhaps impossible, to prove negligence affirmatively. Few are left to speak of this disaster, and none have survived it who would have been most likely to know the

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facts which transpired immediately preceding the explosion. How it came about is matter of opinion. Men of science, and men of practical skill and experience in the structure and management of the steam engine, alone can tell; and, we affirm, such is the nature of the subject, that their opinions are absolutely conclusive—as certain and satisfactory as the opinion of a medical man, as to the cause of the death of a person, in whose stomach, upon a *post-mortem* examination, he had found a quantity of arsenic.

On the trial, it was said, the opinion sought was as to the very question the jury were to try. Was this so? It does not differ, in this respect, from the cases cited. If answered in the negative, it establishes that there was negligence; but, so in the case of the embarkment, if the opinion had been that it was the cause of the harbor going to decay, it would have been equally decisive of the result in that case.

The plaintiffs affirm, the boat was completely manned, the boilers, machinery, etc., well made and in good order, and that there was no want of skill and care; and notwithstanding an explosion, the 152] most appalling and disastrous in the history of \*steam navigation, takes place without any external cause to produce it. The defendants call upon men of skill and science to say, if, under such circumstances, the facts being so, an explosion could have taken place. And we know, from what occurred on the trial in the court below, that each witness would have answered, unhesitatingly in the negative.

The second proposition is, that if the explosion of boilers proceed from an *internal cause*, it is, of itself, *prima facie evidence* of a want of proper care and attention on the part of those having the management of the boat.

If a stage-coach be upset, and a passenger injured, proof of these facts alone establishes, *prima facie* that there was carelessness, or negligence, or want of skill, on the part of the driver, and throws upon the defendants the burden of proving that the accident was not occasioned by the driver's fault. *Christie v. Griggs*, 2 Camp. 79; *Stokes v. Saltonstall*, 13 Pet. 190; *McKinney v. Neil*, McLean's C. C. 540.

We do not find the reason of this rule given in any of the cases, but it is evident it is upon the ground that the coach is staunch and strong — roadworthy; that the horses are gentle, manageable,



and properly harnessed; and that the driver has the requisite skill and prudence to guide them along the road with safety to the passengers. Such is the understanding of those who trust themselves to stage conveyance. There is an implied warranty to this effect; and if any accident occurs, it is out of the usual course of things, and for the proprietor of the coach to explain and reconcile with his obligations to the passengers. So, in our opinion, is the rule, and for a better reason, in case of loss or injury from explosion of boilers. In the latter case, there is also an implied warranty, that the boat is, in all respects, seaworthy.

A steam engine, properly constructed, is entirely within man's control. Such is the common sentiment. Did not men think so, they would as soon embark on a floating volcano as on a steam-boat. But this idea of security does not rest on common opinion, merely. It is a matter of science. The laws of steam are as well understood as the laws which regulate any other power. [153] Such is the testimony, both of scientific men and experienced practical engineers. It has been satisfactorily ascertained, by scientific experiments, that, when the temperature in the boilers is 342 degrees, the expansive force is 120 pounds to the square inch, which is regarded as the limit of safety with common western boilers; and every time about forty or fifty degrees of heat are added, the expansive force is doubled. 472 degrees of heat produce 525 pounds of pressure, which is regarded the point of unavoidable bursting of common western boilers.

Boilers are now gauged at about ninety-six pounds, by the best and most skillful manufacturers; that is, the safety valve is so adjusted, that, with a pressure of ninety-six pounds to the square inch, it will rise and let the steam escape; and this result is as unerring as the law of gravitation, if the valve is *left free* to act as adjusted by the maker. This is far within the limit of safety; and yet experience proves that such degree of heat and pressure will generate as much steam as can be worked off in common cylinders, and that all beyond is useless. The rule for ascertaining the strength of the boilers, is to multiply twice the thickness of the boiler iron, in inches, by 60,000, and divide the product by the diameter of the boiler, in inches; the quotient will be the utmost which a perfect boiler, made of the best iron, will bear to the square inch. *But it should never be used with one-fourth of this.* The gauge-cocks will always indicate, with sufficient certainty, to the

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practiced engineer, the height of the water in the boilers. Thus, by means of the safety valve and the gauge-cock, the engineer is enabled, at all times, to know where the limit of safety is, and when it is departed from. Explosions are, invariably, produced, either by a pressure greater than the strength of the boiler iron, undiminished by heat, can bear, or from permitting the water to get too low, the flues bare, overheated, and so weakened that they are unable to resist more than the ordinary pressure. But an explosion, in either way, presupposes negligence. It may be difficult to determine in which of these modes an explosion has occurred; and, as to this, men of skill and science may differ, as they did on the trial of this cause. Therefore, we repeat, that the presumption of negligence is much stronger in case of an explosion, than in case of the upsetting of a stage.

Roads are not always smooth and level; ruts may be worn deep, and the horses may become restive, or may take fright; they have a will independent of the driver; but the steam engine has no will, and can not be frightened: it operates by fixed and well-known laws, from which it never deviates. Of all the great moving powers, it is the most completely manageable. Gravitation can not be controlled; the wind may swell to a hurricane, which can not be resisted; animal strength may rebel against its commander, but steam, however vast its power, may always be kept under perfect obedience. A child, when instructed how, could manage the mightiest engine ever made. Unless, therefore, an explosion be accounted for from some external and unavoidable cause, the presumption of negligence is irresistible.

The third reason assigned for a new trial is, because the court refused to charge the jury, as asked by the defendant's counsel, *that the explosion of the boilers, from an internal cause, was not an accident within the terms of the policy, or covered by it.*

The insurance was taken in terms, upon the "*hull, tackle, and apparel.*"

The risks insured against are, "of the seas, rivers, fires, enemies, pirates, rovers, assailing thieves, and all other perils, losses, and misfortunes which shall come to the damage of the said steamboat, according to the true intent and meaning of this policy, *as herein expressed.*"

The words are the same which have been used for ages, long before the steam engine was known. They had received an es-

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established construction before this new peril became possible, and, therefore, this would not be included without special mention. The insurance is not taken, in terms, upon the boat or the engine; explosion is not one of the enumerated perils. \*The only [155 enumerated perils which could, under any circumstances, include this, would be of "*rivers or fires*." The peril of *fire* is well understood to mean *burning up*, not exploding; for fire is no more the cause of explosion than water is. Both must concur with other causes; and with as little propriety can explosion be called a peril of the *river*. It is a peril of steam, wherever used, on land or water. Snagging, sinking, collision, and the like are perils of the river, and were so before steam was known. But as well might fire be called a peril of the river, because it occurs on the river, as to say that explosion is, for the like reason.

It may be said, however, that explosion comes within the phrase, "and all other perils," etc. The general rule of construction is, that whenever an enumeration is attempted, all particulars not enumerated are excluded. A specific enumeration of rights or duties can not be enlarged by subsequent general terms in the same instrument. But the policy itself settles the question, for it confines these other perils to such as may happen "within the true intent and meaning of this policy, *as herein expressed*." In other words, all losses and misfortunes, which may result from the enumerated perils, are covered by the policy, whether they be direct or consequential, but no other. And this is the opinion of Kent, 3 Com. 299. We conclude, therefore, that the peril of explosion, being a new peril, peculiar to steam, is not within the policy, unless specially mentioned. And, in this conclusion, we are strengthened by the fact, that no case can be found in the books where it has been held that a loss by explosion was covered by the policy.

The only case we are now aware of, where this question has been determined, was that of *Rogers and Shrewsbury v. These Defendants*, which was arbitrated and decided in 1829, by Charles Hammond and Henry Starr, Esqs. In that case, the insurance was upon the "boat, her hull, engine, furniture, tackle, and apparel." The risks specified were the same as in the present case. The arbitrators determined, upon full \*argument, that a [156 loss by explosion, from an internal cause, was not covered by the policy.

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The fourth and last ground for a new trial is, "*on account of material evidence discovered since the trial, as set forth in the affidavits of C. S. Pomeroy and E. Robbins.*"

Since the trial, the deposition of the witness referred to in the affidavits of Mr. Pomeroy and Mr. Robbins has been taken and filed with the papers, and will be before the court. We therefore submit this last reason without argument.

We are apprised that, in this case, an effort will be made to induce the court to reconsider and disaffirm the rule heretofore established, and so often affirmed, that in case of loss resulting from the negligence of the master and mariners, the underwriters will not be held liable.

This will be urged upon the authority of the decision of the Supreme Court of the United States, in the case of *Waters v. Merchants' Louisville Insurance Company*, 11 Pet. 213, reported since the decision of this court in *Fulton and Foster v. Lancaster Ohio Insurance Company*, 7 Ohio, 5.

We shall not review the authorities bearing upon this vexed question. Nothing, perhaps, except what may be peculiar to this case, can be added to the argument of counsel, and the lucid and very able opinion of this court above referred to.

In our judgment, the correctness of that decision, upon principle, is not shaken by the reasoning of Mr. Justice Story, in the case in 11 Pet. The weight of authority, too, upon the precise question, is on the side of the decision of this court. For, let it be borne in mind, that the question is, whether in a *marine* policy, *which does not contain a clause against barratry*, negligence will excuse the insurers; and there is not a single decision upon such a policy, except the one in 11 Pet., and one by the same judge on the circuit, reported in September No., 1842, Law Reporter, 200, where it has been held that negligence did not excuse. It is desirable that the decisions of the Supreme Court of the United States, and those of the state courts, should harmonize upon questions of this sort. But it is quite as desirable, that rules of law [57] should be established \*which will stand the severest scrutiny of enlightened reason, and the test of experience, and we are constrained to say, highly as we appreciate the character of the judge, who delivered the opinion of the court in the case in 11 Pet., for legal learning and sound judgment, that we do not think the rule there laid down will stand either of these tests. There-

fore, we are disposed to request the Supreme Court of the United States to reconsider *their* opinion, rather than ask this court to recede from a rule, as we conceive, correct in principle, and most salutary in its operation, by mere force of a superior tribunal.

The doctrine that a loss, the *proximate* cause of which was a peril insured against, though *remotely* occasioned by the negligence of the master and mariners, is covered by the policy, is of recent origin in England, and expressly on the ground that barratry was insured against. Liability for a loss by the barratry of the master and mariners was, so to speak, father to liability for loss remotely occasioned by the negligence of the master and mariners.

Now the gist of barratry is the willful misconduct of the *master* and *mariners*. The owner of the vessel has exercised his best judgment in the selection of a master and crew. He has complied with his implied warranty in this respect, but he can not penetrate the secrets of the heart; he has no spear of Ithuriel with which to try them; he can not measure their strength to resist temptation; their fidelity may be seduced. After he has done all that he can do, there is a risk that his *servants* may prove dishonest. This risk he insures against. So the *master* and *mariners*, selected in like manner by the owner of the vessel, may sometimes prove negligent or unskillful, and from such negligence or want of skill, loss may result. True, the owner impliedly warrants that a careful and skillful master and mariners shall be placed in charge of his vessel; but, after all, they may not prove so; there is risk in this respect also; and if, as in the case of barratry, the policy expressed that it should be borne by the insurer, there would be no cause to complain. But to impose this risk when not \*expressed, upon [158 the insurer, seems to us strange and unjust, and the reason given for it in the English decisions, *because barratry is expressly insured against*, strikes us as somewhat absurd. But if negligence does not excuse the underwriter, *whose negligence?* As in case of barratry it is the acts of the *master* and *mariners* that are insured against, so in case of negligence, we affirm from analogy, as well as upon principle and authority, it is the negligence of the *master* and *mariners*, not the negligence of the *insured*.

Judge Story, in the case reported in September No. for 1842 of Law Reporter, 203, says, "The owner can, in most cases, be in no better condition to guard himself against a loss by the negligence of his agents, than he is to guard himself against a loss by accident

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or irresistible force. He does not warrant the fidelity of his agents, but merely their capacity and ability." The import of this language can not be mistaken. A man should no more be permitted to insure against the effects of his own willful misconduct, than against that which will be imputed to mere negligence.

A contrary doctrine strikes away, at once, all distinction between the skillful and unskillful, the careful and the rash; breaks down all incentives to good conduct, and leads to endless frauds.

An individual commanding his own boat (and it often happens, on our rivers, that the same individual is commander and owner), gets her insured at a high valuation, and upon long time, and just before the policy expires, when the boat is worn out and worthless, commits some act of negligence, purposely, perhaps, by which she is lost, and thus pockets the insurance.

Isaac Perrin, the plaintiff's intestate, was the owner of three-eighths of the *Moselle*. The policy upon which this suit is brought, was upon a portion of his interest. He was on board, and in command at the time of the disaster, and, as the defendants claim, it was through his gross negligence or want of skill and prudence, that the loss occurred. He it was that told his friends he had raced with the *Ben Franklin* coming up, and had been beaten, because [159] his boilers were filled with \*Mississippi mud. That his boilers had been cleaned, and he intended to beat the *Franklin* or blow his boat out of the water. His boat was his continual boast. In the language of a number of the witnesses, "he seemed infatuated in reference to it." He had had a convivial meeting of his friends on board, immediately preceding his departure from the wharf, on the voyage so speedily and fatally terminated. He had told those friends, and others, through the city, to look out during the afternoon, and they would see a boat go by the city as boat had never gone. These and many other acts and declarations, evincing the extreme of rashness and folly, immediately preceded the explosion.

If there be any case on a marine policy where it has been held that the insurers were liable, though the loss was occasioned by the negligence of the insured, we have failed to find it. We affirm there is no such decision.

It is said that loss is to be attributed to the proximate cause, and not to the remote cause. In all the cases the negligence was the remote cause, but the proximate cause was a peril insured

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against. Now we insist, in the present case, that the negligence or rashness was not remotely the cause of the loss, but actually concurred as an efficient agent, with other agents, *eo instanti*, when the explosion took place; and that, therefore, this case is not within the rule.

We also submit, whether, if the rule of the Supreme Court of the United States is to prevail, the insurers are to be held liable for every degree of negligence; for instance, gross negligence.

If this court should be induced to overrule their former decisions, and adopt the rule of the Supreme Court of the United States, still we insist for reasons which, we trust, have been made sufficiently apparent, that the rule is not applicable to this case. But we sincerely hope the rule of the Supreme Court will not prevail here. Upon the broad ground of public policy it ought not to prevail. It is not adapted to the spirit and character of our people, especially that portion of them engaged in the navigation of our western and southern rivers. \*There is a degree of enter- [160] prise and fearlessness about these people that can not be kept in proper check by the fear of personal danger, or out of regard for the safety and lives of others. Leave the pecuniary risks incident to the carelessness, or recklessness, or want of skill of these men, to be borne by the owners of vessels, and they will exercise greater care and understanding in the selection of agents, and the standard of attainment will be elevated. Lay these risks upon the insurers, and the spirit, if not the language, will be: *go ahead; the insurance company takes the responsibility!* We fear the effect of such a rule.

CHARLES FOX, for plaintiff, argued against the motion:

The plaintiffs insist an explosion may take place without fault on the part of the officers. But they also insist that mere negligence, on the part of the plaintiffs, or their officers and men, does not discharge the insurer. If the direct occasion of the loss is one of the risks insured against, as fire, a peril of the river, etc., it matters not what may be the remote cause, whether it be negligence, the want of foresight, or anything else not amounting to absolute fraud, the insurer is liable.

If, therefore, mere negligence is not sufficient to discharge the underwriter, it is clearly immaterial to inquire as to what amounts to *prima facie*, and what to conclusive evidence of the fact of negligence. I claim that in no case can the insurer discharge him-

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self from responsibility by showing that negligence was the remote cause of the loss; and, if this is a legal proposition, then there is no doubt of the correctness of the charge of the court.

By a series of decisions, made in the Supreme Court of the United States since this question was first agitated in that court, it is now well established that, "in marine policies, whether containing the risk of barratry or not, a loss, whose proximate cause was a peril insured against, is within the protection of the policy; notwithstanding it might have been occasioned, *\*remotely, by the negligence of the master and mariners.*" 11 Pet. 224.

The cases which had, before this last decision, been considered as establishing this doctrine in the Supreme Court, will be found in 3 Pet. 222, and 10 Pet. 507.

The case in 11 Pet. 224, is directly in point. It was the loss of a steamboat by explosion, caused by the carelessness of the officers and crew, in setting fire to the gunpowder aboard the vessel. The court decided negligence to be no excuse to the underwriter. Judge Story, in delivering the opinion of the court, has examined all the cases on the subject, and has made a masterly argument, which leaves nothing to be said on the subject. The doctrine has been again asserted by the judge, in *Hall v. Washington Insurance Company*, September No. Law Reporter, 1842, p. 201; so that, so far as the decisions of the Supreme Court of the United States are concerned, this question is finally settled.

I am aware this court has held a different doctrine, in several cases, after full argument in bank. But, I think, since the decision in 11 Pet., I am not asking too much of this court, when I urge them to reconsider their own decisions on this subject. In questions of commercial and insurance law, it is very desirable that the decisions of our courts should be uniform; and the decisions of the Supreme Court of the United States, when made ought, in such questions, to be held binding on the state courts. It is not likely that, on such questions, with the assistance of the ablest lawyers in the Union, the opinion of that court would be far from right. But the advantage of a uniform rule, on these questions, is as important as that the decision itself should be right.

I take it for granted, from expressions made use of by this court, in several cases, that it is desirous of following the decisions of the Supreme Court of the Union in questions of this kind. In



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reviewing the decisions of our own court, we find that, in the case of *Lodwick v. Ohio Insurance Company*, 5 Ohio, 436, on the circuit, the judges held that the negligence \*would not [162] discharge the underwriter; but, in court in bank, the court decided otherwise.

In 7 Ohio, 25, it was supposed by Judge Grimke, that the Supreme Court, in 10 Pet. 508, did not intend to decide this question; that the remarks made on the subject, in that case, were extrajudicial; and yet we find, in 11 Pet., the court does consider that the very question had been decided in 10 Pet., and that a more full examination had confirmed them in the opinion then expressed.

It appears to me that the judges, who have held that the negligence of the officers and men, employed on board an insured vessel, releases or discharges the underwriter, have not sufficiently distinguished between the implied warranties which attach to, and form parts of the policy and cases of mere neglect.

It is well settled that there are implied warranties in every case of insurance; and that if these, or any of them, are not complied with, the policy is void; such, for instance, that the vessel is seaworthy. 1 Phil. on Ins. 249, 309.

This warranty of seaworthiness requires the vessel to be staunch, and of sound materials; well provided with men and provisions; captain and officers of the usual skill, and general good character. Where it is customary to take a pilot on board, the vessel is not seaworthy without one, if to be obtained. 1 Phil. 308-316.

I admit that, if any of these implied warranties are not complied with, the insurers are not liable, because the contract is not complete, and the risk never attaches. But it is equally clear, that if the vessel is seaworthy, at the commencement of the voyage, this implied warranty is complied with. But I will not fatigue the court by arguing this question, as I am aware that the attention of the court has been heretofore often called to it. I rely upon the decisions of the Supreme Court of the United States, as having settled the law in the cases referred to; and, secondly, upon the necessity of having a uniform rule on this subject, as sufficient inducements for this court to review its former decisions, and conform to the decisions \*of the fed. [162]

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eral courts, even if they continue to doubt the correctness of the latter decisions.

But I am not willing to admit that this loss was occasioned by negligence; on the contrary, I insist that no negligence was shown at the trial.

It will be remembered that, in all cases, when negligence is set up as a discharge of the underwriter, the fact of negligence must be clearly proved. It is not to be left doubtful, but must be as fully established as the plaintiff's cause of action. 2 Phil. Ins. 759, 760.

So, if the defendants insist that the vessel became unseaworthy at a certain period, it is a fact to be proved by the insurer, because the law presumes a continued seaworthiness. So, if deviation is alleged, it must be proved. *Ib.*; 4 Mason, 440.

If we refer to the evidence, I insist there is no evidence of negligence or carelessness. It is not pretended there was any other evidence or negligence than a desire, on the part of the captain, to make a quick trip, and what might be imagined or inferred from the fact of explosion; whether this was occasioned by keeping the steam too high, by the want of water, collapsing of the flue, defects in the machinery undiscovered, was a matter of great doubt and uncertainty among the witnesses; and the most learned men, those most scientific, appeared to differ most in their views of the cause of the disaster.

The fact is, the powers of steam are not yet fully developed. The accidents, continually occurring, seem to baffle the calculations of the most skillful; and while this is the case, surely the steamboat owner is not to be charged with negligence, merely because no one can account for the accident.

All that is required, on the part of the owners, is that they shall employ men having the skill usually expected of men in that particular business in which they are employed. 4 Mason, 440.

It is also claimed that a loss, by the explosion of the boilers from an internal cause, is not a loss within the terms of the policy. 164] \*I should as soon think of saying a loss occasioned by the wind was not a peril of the sea, when applied to a sea vessel propelled by wind. But let us look at the risks insured against. These are the risks of the river, fire, pirates, etc., and all other perils, losses, and misfortunes, which shall come to the damage of

the steamboat, according to the true intent and meaning of the policy (except losses in money, notes, and evidences of debt).

In construing this policy it must be kept in mind that the subject insured is a *steamboat*, and that the risk of navigating a steamboat on the Ohio river is intended to be insured against. One of the risks of the river is the running against snags, or against rocks, or running aground. Another is, of being injured by collision. Neither of these particular risks is especially named in the policy, but it is known they are all risks that every steamboat has to run in the ordinary course of navigation, and therefore are called perils of the river. So of a vessel propelled by wind.

We are not to expect that every engineer has a perfect philosophical knowledge of all properties and powers of steam. We are bound to have such engineers and officers as are usually employed in the particular trades, not the very best engineers that can be found in the world. "If it were the usage to employ masters not skilled in navigation, a vessel would be seaworthy with only such a one." 1 Phil. Ins. 312, and causes cited.

Now, in this case it was proved our engineers, officers, and men were all good, and no particular act of negligence was proved, and, of course, the defense of negligence was not made out.

If a sailing vessel has too much sail set, a gust of wind, may throw her on her beam ends, and occasion the loss of the vessel. This loss is not specified in the policy, but it is deemed a peril of the sea, and covered by the policy.

A vessel propelled by steam has to make use of boilers and fire in order to generate the steam. One of the risks attending the generating of steam in boilers is the bursting of the \*boilers, [165 caused by a collapsing of the flue, or, if you please, by so increasing the heat as to create an expansive force or pressure of the steam greater than the boilers will bear. Is not this bursting one of the perils attending the navigation of the river?

"The general rule is, that the insurer charges himself with all the maritime perils that the thing insured *can meet with* on the voyage."

"The policy sweeps, within its inclosure, every peril incident to the voyage, however strange or unexpected, unless there be a special exception."

The perils enumerated in the common policy are sufficiently

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comprehensive to embrace every species of risk to which ships and goods are exposed from the perils of the sea, *and all other causes incident to maritime adventures.* 3 Kent's Com. 291.

"Under the perils of the sea, which constitute a part of the risks in almost every marine policy, are comprehended those of the winds, waves, lightning, rocks, shoals, running foul of other vessels, *and, in general, all causes of loss and damage to the property insured, arising from the elements, and inevitable accidents, other than those of captures.*" 2 Phil. Ins. 635.

Under the term, *perils of the river*, therefore, I insist, a loss by the explosion of the boilers must be included. The boat is expected to be propelled by steam, and one of the risks of using steam is explosion. In the language of Lord Mansfield, "the means must be taken to be insured, as well as the end." 1 Bur. 348.

Again, the clause by which the owner is insured against—"all other losses and misfortunes which should come to the damage of said steamboat"—covers the loss by explosion.

Now, it is admitted that the whole instrument must be taken together in giving it an interpretation. This clause means something, and, it is said, "may have the effect of extending reasonable indemnity to many cases not distinctly covered by the special words; they are entitled to be considered as material and operative words, and to have their due effect assigned \*to them in the construction of this instrument, and which will be done by allowing them to comprehend and cover other cases of marine damage, of the like kind, with those specially enumerated, and occasioned by similar causes." 2 Phil. Ins. 688; 5 M. & S. 461.

This clause, then, may be said to cover other losses not enumerated in the policy, provided they are occasioned by the perils incident to the business. We must take a common-sense view of the question in this, as in all other cases, and not be seeking after technical excuses. As the ingenuity of man is continually contriving new means of effecting the same object, whether it is in propelling boats, or performing any other useful act, we must consider these new means of obtaining the same object, as embraced in every contract made, in which their use is fairly expected.

And such has been the decisions and practice of the courts. Thus, we find, in *Ellery v. New England Insurance Company*, 8 Pick. 14, where a ship had been hauled out on a marine railway

to be repaired, and, while being hauled, fell over on her side. It was held, that although his mode of repairing was of modern origin—indeed, had been introduced after the policy had been signed—yet, as the railway had been tested again and again, was in common use when the ship was placed upon it, the court decided that the loss came within the description of “all other losses,” and that the parties might reasonably be supposed to contemplate, that the most approved means should be employed in repairing, as well as in the management of the ship; and that, as the ship was within the protection of the policy when repairing, “the means must be taken to be insured as well as the end.”

But, in the present case, I suppose, as, in the case in 11 Pet. 224, the explosion was caused by fire, the latter was the proximate cause of the loss, and the policy, therefore, covers this loss by the express terms of the policy.

Since the foregoing was written, I have seen the argument of the defendants' counsel, and have nothing to add to what I have already said on the subject before discussed. But, on \*the argument of the defendants' counsel, as to the refusal [167 of the court to permit the question, as to the opinion of the witness, to be propounded, I have a few remarks to make.

The defendants' counsel, in attempting to sustain the right to ask the question propounded, place it on the ground that it is a question of science or skill, and that, therefore, persons of science and skill may answer by giving an opinion. I do not so consider this matter. In the first place, when the opinion of a man is asked, instead of facts, that opinion is received upon the supposition that there is a difficulty in making a full explanation of the particular facts to the jury, because they are so connected with the particular science as not to be easily understood, except by persons learned in the science, and hence opinion is substituted for facts. “The rule is confined to cases in which, from the very nature of the subject, facts disconnected from such opinions can not be so presented to a jury as to enable them to pass upon the question with the requisite knowledge and judgment.” 7 Wend. 78.

But it must be recollected, also, that persons of science, etc., who give their opinion, are bound to disclose the facts upon which they are based; and even a physician, although upon facts testified to by others, may give an opinion that the wound, etc.,

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was capable of producing death, yet he can not be asked for his opinion of the whole case, or whether the accused was the cause of the crime, etc.

So the opinions of witnesses as to the improbability of a blow having been given from which death ensued, judging from the relative positions of the parties, as stated by witnesses, are not admissible. 19 Wend. 569.

If we look at the question propounded, we shall see that the whole object of it is to ascertain the opinion of the witness whether there was negligence in the management of the boat. This is the naked question, when stripped of the artful manner of propounding it. Let us put the question directly to the witness, and it will be in these words: Do you think this loss would have taken place if the managers of the boat had not been guilty of 168] negligence? Suppose the answer to be no; \*then the question would be asked, why do you come to that conclusion? And the answer would be, in the language of the interrogatory, because if the machinery and boilers be of good material, properly constructed, and in good order, and managed with skill and care, an explosion can not take place. So that every one must perceive that it is really asking the opinion of a witness as to the whole case. There is not a case to be found giving countenance to such an interrogatory. Its object is to induce the jury to adopt the conclusions of witnesses, instead of their own, and there was not a man on the jury who could have answered the question as well as a scientific man. There is no case where an insurance office might not avoid paying a loss, if negligence was to be proven by such sort of testimony. There is no loss happens, probably, without some fault, negligence, or risk run. A boat, by laying by all night, might avoid running against a snag, which could be seen in the day-time, although not at night. A boat is run aground, and yet, if the pilot had taken the precise place, where the water was deepest, he would not have grounded, and it was carelessness in him not to have taken that particular spot. A steward or servant has left a candle burning, and it has by some means set the boat on fire. The office says this was a careless act, and we are not bound, because if the boat was sound, managed with skill and care, the fire could not have taken place. So an engineer accidentally falls asleep, and by some means the supply-pump gets out of order, and no water is forced into the boilers, in conse-

quence of which the steam gets highly heated and the boilers burst. The office say there would have been no loss if the engineer had not fallen asleep, and it was a careless act in him to do so. Now, it is admitted in the defendant's argument that the insured is only bound to select ordinarily careful men to control his boat; but, according to this mode of proving negligence, he is made responsible for the very slightest degree of carelessness. There is no view of the case in which such a question can be tolerated.

\*As to the newly-discovered evidence, I have not seen [169 any. The affidavits made at the trial, by Mr. Robbins and Mr. Pomeroy, only showed that, by proper diligence the defendants could have accumulated more testimony; but that is no ground for a new trial. I have not taken the trouble to examine the depositions, because I suppose the defendants had no authority to take such testimony, unless by consent; and also because I suppose it is merely cumulative testimony.

On the whole case, I think it was evident to the court that the plaintiff ought to recover. There was no act of negligence shown; that the captain was proud of his boat; that he made foolish brags of what he could do with her, and really believed he had the best boat, and the fastest boat, on the river, I am willing to admit; but that he, or his engineers, were guilty of negligence, I deny. The defense of negligence, then, has not been proved. To say the most of the defense, it has left it doubtful whether there was negligence or not; but that is not sufficient, and therefore the plaintiff ought to have judgment.

LANE, C. J. The newly-discovered evidence is cumulative only. At the trial it was shown that preparations were made, before starting, to overtake another boat; that fires were kept burning with great fierceness; and that the boilers had become very hot; that the escape of steam was attended with a peculiar shrill noise, denoting great pressure, and so loud as to awaken notice and alarm. The new evidence is the testimony of a witness who, going on board, was terrified by the violence of the fires, the intensity of the heat, and the glimmer from the ascent of heated air, "which seemed to make the boilers creep and move in their beds," and goes little further than to furnish additional evidence of facts already before the jury.

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That a loss arising from an explosion of the boiler is covered by the policy, seems plain to us, when we consider the subject insured, and the nature of the risks to which it is of necessity exposed. The insurance was on a steamboat. The policy is in the [170] form which has long been in use for marine risks, and the words which describe the perils are large enough to embrace all such as arise in the ordinary use of the thing insured. A policy on ships covers losses arising from accidents to the power which moves them, and it must be presumed that the parties contemplated the same protection to a steamboat, when the loss occurs to her motive agencies.

The other causes for which the new trial is asked depend upon the right of the defendant to use the negligence of those managing the boat as a defense against this liability.

This point first came before this court in 1832. *Lodwick v. Kennedy*, 5 Ohio, 433. The business of insurance at that time was new in the western waters, and had rarely been the subject of investigation in our tribunals. The court, of which I was then a member, found the rule exonerating insurers from losses arising from the negligence of master and mariners, established in New York. *Goix v. Law*, 1 Johns. 346; *Vos and Graves v. The United States Insurance Co.*, 2 Johns. 187; *Grim v. Phoenix Insurance Co.*, 13 Johns. 457; and countenanced by such English authorities as were within our reach, and in entire correspondence with that general principle, which makes the act of the servant the act of the master.

In these earlier cases no distinction seems to have been taken between losses which arise from the want of capacity and skill, and those which are the results of mere carelessness. The former class are never covered by the policy. But there has been, through the recent jurisprudence, especially through a series of cases decided since that, in 5 Ohio, a modification of the rule, and a disposition to extend the responsibility of the insurer to the latter class of risks. The English cases may be found in 2 Barn. & Ald. 73; 5 Ib. 171; 5 Barn. & Cres. 219. The same charge has prevailed in the United States. It is recognized with favor in *Papasco Insurance Co. v. John Coulter*, 3 Pet. 222; *Columbia Insurance Co. v. Lawrence*, 10 Ib. 517, and in some circuit court decisions; and is finally accepted in 11 Pet. 205, by the Supreme Court, as a well-established principle of the law of insurance.



\*While this doctrine was assuming this form, and before it [171 became an admitted principle of our commercial jurisprudence, it was again before this court, in *Fulton & Foster v. Lancaster Insurance Company*. I entirely concurred with my brethren in the opinion that no propriety was, at that time, shown for changing our position, as the new rule had not been then sanctioned by the direct authority of any ultimate American court. This uncertainty is distinctly dwelt upon by the judge who reported that case. The decision since made, in 11 Peters, 205, has supplied a precedent, of the most weighty character, settling the law, in the federal courts, in a manner likely to be followed in the courts of these states, where the law merchant is best understood.

The present case distinctly lays before us the propriety of *now* adhering to our former decision. This is not a question of local law, springing from our own fountains of jurisprudence only, but a general commercial principle, resting on broader foundations, which ought to be uniform among all civilized nations. When the law of insurance has, in its fuller development, received an important modification, in the English and federal courts, and which, probably, will be the rule of the state courts, as fast as they act upon the question, it may be emphatically asked, whether the courts of Ohio should not conform to this change? It would be not a little inconvenient, as well as odd, if our citizens should receive one interpretation of the universal law merchant in our courts, while the stranger receives one different, by appealing to a different tribunal, which holds its seat by our side.

If the proposed change were wrong in itself, it ought not to be adopted; but it seems to commend itself to our acceptance, by its intrinsic propriety. The assured is bound to provide competent capacity and skill; it is a part of his implied warranty, and a duty which caution will enable him to perform; but the risks which arise from the carelessness of his servants, which are among the prominent perils he encounters, are those from which no prudence will defend him, and from which he may well ask protection from the insurer. If, too, \*the inquiry be extended beyond the [172 proximate cause of loss, it will assume a latitude inconsistent with the distinct and intelligible rule, by which the rights of the parties should be defined. Were the point now first offered to our courts, after these late discussions, it is hardly to be doubted that their modification would be received. And, since it has been accepted

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in this form in these courts, to whose decisions we look for evidence of commercial law, and since we believe it has, in fact, become a well-settled doctrine of the law merchant, we feel it a duty to recede from the position heretofore taken in these adjudged cases. The adoption of such a principle renders the inquiry sought by defendants irrelevant, and leads us to overrule the motion.

Motion overruled. Judgment for plaintiff on the verdict.

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GEORGE CARLISLE v. JAMES WISHART.

Where a negotiable note has, before it fell due, been transferred in consideration of a pre-existing debt, the maker can not, as against the person receiving it, without notice, take advantage of any equities between himself and the payee.

A pre-existing debt is a good consideration for the transfer of a negotiable note, and a bona fide indorsee, without notice, takes the note discharged of prior equities.

THIS is a motion for a new trial, from the county of Belmont.

The action was assumpsit, against the maker of the promissory note, for \$666.66 $\frac{2}{3}$ , dated August 23, 1838, at six months, payable at the Franklin Bank of Cincinnati, to Joseph S. Benham, or order, and was indorsed, and transferred to the plaintiff, by Benham, before maturity, in payment of a precedent debt. The plaintiff received the note in good faith, and without notice of the consideration, or of any defense as against Benham.

173] \*On the trial the defendant gave evidence of the consideration of the note, and that the same had failed, and other matters, tending to prove that, as against the defendant, Benham ought not to recover; to which evidence the plaintiff objected, but the objection was overruled, and the court charged the jury that, inasmuch as the note had been transferred in payment of a *pre-existing debt*, the defendant could make any defense that he might have made in case Benham, the payee of the note, had sued the same.

The jury found for the defendant, and the plaintiff then moved the court for a new trial.

DANIEL PECK, for plaintiff:

The only question on this motion is, whether a *pre-existing debt* is such a consideration as will protect the holder of a negotiable note, transferred before due without notice of any defense between the original or antecedent parties to the paper.

I consider the question arising in this case of great importance, and well deserving the consideration of this court.

The books and cases all agree that paper of this description, taken *bona fide* and for a *valuable* consideration, shall, in the hands of an innocent holder, be protected. But there has latterly arisen, in some courts, a difficulty as to the true meaning of the term *valuable* consideration, some holding it to be anything which would amount to a good consideration for ordinary purposes, while others contend that it means a *present* consideration that is given, either in money or goods, at *the time* of the transfer, and that a *pre-existing debt* is not such a consideration.

This court, in the case of *Riley & Van Amringe v. Johnson et al.*, 8 Ohio, 526, held that a consideration of that character was not sufficient for such a purpose.

That opinion, and the cases for and against it, I propose to review.

The opinion in the case of *Riley & Van Amringe v. Johnson et al.*, professedly rests, for authority, on the case of *\*Coddington et al. v. Bay*, 20 Johns. 637, and other cases, having that as their foundation; and, considering that it was to settle a point of such importance for the first time in this great state, it seems to me that it did not receive a very thorough investigation; and, for aught that I can see, the case may have been mainly, if not altogether, decided against the plaintiff on the ground of fraud, or notice of the defense as between the original parties to the note. It may have been decided correctly without touching this point.

It seems to me that the case of *Coddington et al. v. Bay* has been strangely misunderstood by the Supreme Court of New York. In the original case, when decided by Chancellor Kent, he says: "That the defendants (the Coddingtons) are not holders of those notes and securities for a valuable consideration. The notes were not negotiated to them in the *usual course* of business or trade, nor in *payment* of any *antecedent* or *existing debt*, nor for cash or property advanced, debt created, or responsibility incurred on the strength of the notes." 5 Johns. Ch. 54.

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This case was, by the Coddingtons, appealed to the court for the correction of errors, and it was upon such a case that some of the members of that court undertook to say that a *pre-existing debt* was not a valuable consideration for the purpose of protecting a *bona fide* holder without notice, a point not necessary to the decision of the case, nor, in fact, in it at all. The opinions then delivered on that point are mere *dicta*, though, for some time afterward, the Supreme Court of that state considered those opinions as the settled law of that state, and held accordingly.

The next case which I will notice is *Rosa v. Brotherson*, 10 Wend. 85. The note was transferred by the payee to the plaintiff, before maturity, in payment of a *precedent debt*. As between the original parties the note was of no validity. The Supreme Court decided, on the authority of *Coddington et al. v. Bay*, that to protect such paper there must be a *present* consideration paid, 175] and one who takes such a note for a precedent \*debt, takes it subject to all the equities between the original parties.

In the case of *Ontario Bank v. Worthington*, 12 Wend. 600, the same doctrine is held, the same reasoning adopted, upon the same authority alone.

Afterward, the same court, in *Smith v. Van Loan*, 16 Wend. 659, take occasion to explain the case of *Rosa v. Brotherson*, and, by a reference to the original papers, it was found to be of that character that the plaintiff could not have recovered without any such rule.

The case of *Coddington et al. v. Bay* has been much weakened, if not entirely overruled, by some late cases in the Supreme Court of New York. The case of *Bank of Salina v. Babcock*, 21 Wend. 499, was a note indorsed and transferred in payment of an old debt, the securities for which were canceled. The court held that the *cancellation* was a sufficient consideration.

So, in *Bank of Sandusky v. Scoville*, 24 Wend. 115, the court held that the discounting of the note, and applying the proceeds to the payment of a pre-existing debt, was a sufficient consideration to support such a note in the hands of an innocent holder; and in the case of *Mohawk Bank v. Corey*, 1 Hill, 512, the court overruled the defense that the note was transferred for a pre-existing debt, because the plaintiff not only took the note in payment, but gave up the old securities. It would seem that the Supreme Court of New York now only hold the rule applicable to notes

transferred in *security*, and not as payment. See *Manhattan Co. v. Reynolds*, 2 Hill, 140.

It is probable that if the highest court in the State of New York was now called upon to decide this distinct proposition, it would decide it in accordance with the general decisions on that subject, adopted by other courts, and not adhere to the opinion delivered in the case of *Coddington et al. v. Bay*.

The Supreme Court of Connecticut, in the case of *Brush v. Scribner*, 11 Conn. 388, decide that a *pre-existing* debt is a valuable \*consideration, and will protect an innocent holder of [176 such paper.

That suit was founded on a note made in New York, by Brush and Cook, for \$320.50, payable to A. S. Scribner, or his order, and was indorsed in blank.

The defendant claimed that this note had been made and indorsed for the purpose of being discounted in the Fairfield Bank, for the benefit of the makers, and, for that purpose, had been delivered to one Stevens, who had no right to it at all; and that he had *fraudulently* negotiated it in part payment of an antecedent debt, and partly for goods. The plaintiff had no notice of any objection to Stevens' title to the note. The plaintiff had a verdict, and the defendant moved for a new trial, because the court charged the jury that the previous indebtedness of Stevens was a sufficient valuable consideration. The case of *Coddington et al. v. Bay* was cited and relied on; the more so, as the cause of action accrued in the State of New York; and it was insisted, for the defendant, that the laws of New York, and the decision of her courts, ought to govern the case.

Chief Justice Williams delivered the opinion of the court. He first lays it down as a well-established elementary rule of law, that "if the assignment of a note is a fraud upon the indorser or maker, yet a *bona fide* holder, for a valuable consideration, without notice, will be protected in receiving the paper in the usual course of business."

"Negotiable notes, bills of exchange, and bank notes, are all placed on the same footing, and for the same reason; because these principles would, alone, secure their free circulation."

"If one puts it in the power of a servant, or any one else, to make himself appear the owner, he shall suffer, if any one does, for his misplaced confidence."

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"It is denied that a *pre-existing* debt is a valuable consideration spoken of in the books; it is true that in those cases there was a present consideration passing, but then there is no distinction made; it is laid down in broad terms; and if such paper can not 177] be safely taken in payment of a *pre-existing* debt, \*it can not be said to have a free circulation, and thus the great object is defeated."

"The more exceptions that are introduced, the more will be the embarrassments of the circulation; and the injury to the circulation of bills and notes must be nearly as great, if they can not be passed in payment of antecedent debts, as if they could not be passed for goods."

"The amount of such paper, passed to the custom houses, banks, etc., is so great, that the court will not make any such rule, unless the law requires it. No case is cited to show that the term *valuable consideration* means in a limited sense."

He then reviews the American cases, and cites Payson v. Coolidge, 2 Gallison, 233, where Justice Story says, "there is no foundation for the distinction, asserted by the defendant's counsel, as to receiving such a draft for a *pre-existing* debt. Although a debt be already due, the party who receives such a draft, in part payment, thereby as much gives credit to the drawer and acceptor, as a party who advances his money upon the draft." In the same case, appealed, 2 Wheat. 66, 73, Chief Justice Marshall says, "that, in all cases, the person who receives such a bill, in payment of a debt, will be prevented from taking other means to obtain the money due him; and the mere circumstance that the bill was taken for a *pre-existing* debt had not been thought sufficient to do away the promise to accept."

He then cites the case of Townley v. Sumrall, 2 Pot. 170, 182, in which Story, J., says, "it can make no difference in law, whether the debt, for which the bill is taken, is a *pre-existing* debt, or money then paid for the bill. In each case there is a substantial credit given by the party, to the drawer, upon the bill, and the party parts with his present right at the instance of the promisee." Such he decides to be the law of Connecticut.

He then reviews the cases of Coddington et al. v. Bay, and Bay v. Coddington et al., and although he admits the correctness of the decision of those cases, upon the case made, yet he does not 178] think it was necessary to decide this point in those \*cases,

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and thinks the cases subsequently decided, being only of the Supreme Court of that state, ought not to be considered of very great authority in other courts, for, even in that state, the court of errors might, if the point really arose, adjudge otherwise. The motion for a new trial was overruled.

The court will recollect, that, in the agreed case of *Riley & Van Amringe v. Johnson et al.*, there were two notes, of \$1,500 each. The first one sued on was lost in this court. The plaintiffs, finding that they had such bad luck in the state courts, sued on the other note in the United States Circuit Court, and, at the December term, 1841, obtained a verdict, under the charge of Justice McLean, that the payment of a pre-existing debt was a sufficient valuable consideration to protect the holder, without fraud or notice. The defendant moved the court for a new trial, on account of such instruction; the court divided in opinion, and the motion was certified to the Supreme Court, and the motion failed.

The case of *John Swift v. George W. Tyson* was tried in the southern district of the United States court for New York.

This action was instituted on a bill of exchange, dated at Portland, Maine, on May 1, 1836, for \$1536 30, at six months, drawn by Nathaniel Norton and J. S. Keith, upon, and accepted by, the defendant; the bill having been drawn to the order of N. Norton, and by him indorsed, before it became due, to the plaintiff. The bill had been received from the drawer, N. Norton, in payment of a note made by Norton and Keith, which had been protested at the Bank of Maine. The acceptor resided in the State of New York, and the defense was, that the same, with acceptance of other bills, had been given for lands in Maine, the title to which was imperfect, of which lands the drawers represented themselves to be the owners, and, also, that the lands were falsely and fraudulently represented to be of good quality, and of great value. The plaintiff had received the bill without any knowledge of the consideration for which it was accepted. The defendant offered evidence of the bad quality of the land, and the want of title to the same in the drawers of the [179 bill, and that the representations of the drawers, as to the land, were false and fraudulent. Whereupon the plaintiff objected to the admission of such testimony, or any testimony as against the plaintiff, impeaching or showing the failure of the consideration on which the said bill was accepted. And the judges divided in

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opinion on the point of law, whether, under the facts, the defendant was entitled to the same defense to the action as if the suit was between the original parties to the bill; whether such evidence was admissible as against the plaintiff; which division and point of law was certified up to the Supreme Court, to be there finally decided.

At the January term of the Supreme Court for 1842, this case was heard, and is reported in 16 Pet. 1.

The court decide:

1. That there is no doubt that a *bona fide* holder of a negotiable instrument, for a valuable consideration, without any notice of the facts which implicate its validity, as between the antecedent parties, if he takes it under an indorsement, made before the same became due, holds the title unaffected by those facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity.

2. The holder of negotiable paper, before it is due, is not bound to prove that he is a *bona fide* holder, for a valuable consideration, without notice, for the law will presume that in the absence of all rebutting proof; and, therefore, it is incumbent on a defendant to establish, by way of defense, satisfactory proof of the contrary, and thus to overcome the *prima facie* title of the plaintiff.

3. That section 34 of the judiciary act of 1789, which declares, "that the laws of the several states, except where the constitution, treaties, and statutes of the United States require, or otherwise provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States, where they apply," 180] has uniformly been supposed, \*by the Supreme Court, to be limited in its application to state laws, strictly local; that is to say, to the positive statutes of the state, and the construction thereof, adopted by the local tribunals, and to rights and titles to things having a permanent locality; such as the rights and titles to real estate, and other matters immovable, and *infra territorial* in their nature and character. The section does not extend to contracts, or other instruments of a commercial nature; the true interpretation and effect of which are to be sought, not in the local tribunals, but in the general principles and doctrines of commercial jurisprudence.

Mr. Justice Story, delivering the opinion of the court in this case, says: "We have no hesitation in saying, that a *pre-existing*



debt does constitute a valuable consideration, in the sense of the general rule already stated, as applicable to negotiable instruments."

And again: "It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass, not only as security for new purchases and advantages, made upon the transfer thereof, but also in payment of, and as security for, pre-existing debts. The creditor is thereby enabled to realize, or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor, also, has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion, that negotiable paper can not be applied in payment of, or as security for, a pre-existing debt, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then, by circuit, to apply the proceeds to the payment of his debts."

The very question, in this case, has been, as above, fully settled by a respectable state court, and by the Supreme Court \*of [181 the United States. Inasmuch as the Supreme Court follows the state courts in the decision of all local questions, it is but right, so far as the general principles of the common law are concerned, especially *commercial law*, that the state courts should be governed by the Supreme Court; and this should be done, if not as a matter of absolute authority, at least good policy would require it. Otherwise, we will have the same question decided differently in the different courts, in the same state, and it will lead to various shifts and devices to sue in that court which will give the most favorable judgment. This would lead to injustice and confusion.

And where can we look for the rule of decision on such questions, with the same satisfaction, as to the Supreme Court of our own country? Good policy would require this, but does this question rest upon that ground alone? I think not.

At this time, bills of exchange and notes, in some form, constitute, in a great measure, the currency of the country, and, in various ways, represent the wealth of the land. Those instruments being indispensable in trade, ought not to be embarrassed in any

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respect; and, so long as the present mode of doing business is continued, it seems to me, that the negotiable paper, in the usual course of business, should pass as freely as bank notes, and, whether taken for a past debt, or a present consideration, should make no difference, or be inquired into. The object of such instruments is to supply the place of money, and that can not be carried out fully only by putting them on the same footing.

The only real argument attempted to be set up for the rule, as laid down in *Coddington v. Bay*, is this: that the party, taking the paper for a pre-existing debt, loses nothing if he fails, and makes that a clear gain if he succeeds; and this reasoning assumes, that the original cause of action remains, in every respect, unaffected; and that the party may, and can, proceed upon that in the same manner as though he had not taken the new paper.

182] \*We can suppose a case of that sort, but would it be the ordinary kind of case? I presume not; if taken in *payment*, the original debt is satisfied, at least until the security fails; if taken in payment, or renewal of an old debt, the old note is generally given up or canceled; and this last is the ordinary case of such paper.

Undoubtedly there will be some hard cases; but it is better that some imprudent men, who put it in the power of any one else to appear to be the owner of paper, who, in fact, is not entitled to it, should suffer, than that the whole system of bills and notes should be embarrassed by exceptions in their favor. Besides, the consideration of paying an old debt it seems to me, ought to be as much favored as the contracting a new debt, or submitting to the operation of having the paper shaved.

Will the court undertake to say, that it is not in the *ordinary course of business* to pay an old debt? It is well observed, by the counsel for the plaintiff, in *Swift v. Tyson*, "that it was once the ordinary course of trade to pay debts, and should be yet."

Taking the weight of authority into the account, and the ground on which it rests, I think that this court should not hesitate to follow the rule laid down by the Supreme Court of the United States. In doing this, no one is injured, for it is only enforcing a good rule, that has, in some instances, been departed from; it is not adopting any rule which is to change any rights of property; and if it has a tendency to prevent one from parting

with his name in a negotiable shape, it might, in that respect, operate beneficially.

If the rule, as contended for, as laid down in *Coddington v. Bay*, be established by this court, where will the effect of it cease? If the holder of a negotiable bill or note can be met with the same defense that could be made to the original payee, from whom he received it, what becomes of all that class of bills and notes made for the accommodation of some of the parties? None of the original parties to such paper could maintain any action on it.

\*SHANNON & ALEXANDER, and THOMAS ALEXANDER, for de- [183  
fendant:

The question arising in this case is whether the indorsement of a negotiable note, before due, and without notice, but *on account of a precedent debt*, will subject the indorsee to all the equities existing between the original parties.

It is not denied that, as between indorser and indorsee, a precedent debt is a valid consideration; nor is it urged that the fact of the taking a negotiable note, by indorsement, for a *precedent debt*, constitutes a defense for the maker, at the suit of the indorsee; but it is claimed that this circumstance throws the indorsee back on the title of the indorser, and affects him by all the equitable circumstances existing between maker and payee.

"The liabilities of parties to negotiable paper have been fixed on certain principles which are," or at least have been supposed to be, "essential to the credit and circulation of such paper, and these principles originated in the convenience of commercial transactions." 6 Pet. 59.

The *law* was founded on commercial policy, and the *liabilities* of the parties on the law.

It was supposed to be necessary, for the advancement of trade, that the most free circulation should be given to bills and notes, and by protecting third persons, who might receive such evidences of debt for a *valuable consideration*, and without notice, that free circulation was to be obtained. Then, going on the hypothesis that the foregoing principles are true, it is thought that the following propositions can be amply sustained:

1. That the indorsement of a negotiable promissory note, before maturity, without notice, *but on account of a precedent debt*, is not

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such a transfer as ought to be favored in law, on the grounds of *commercial policy*.

2. That such a transfer is not a taking for a *valuable consideration*, and in the usual course of trade, within the meaning of those terms, as applicable to this class of cases.

184] \*The rule of law is, that an indorsee, who receives a negotiable note, *bona fide*, before due, without notice, and for a *valuable consideration*, shall not be affected by the equities existing between the original parties to the note.

The reason of this rule, as all the authorities agree, is, that the indorsee, in such case, having *parted* with his *property*, or *money*, on the faith of the *maker's* promise to pay, and having incurred *loss* thereby, is entitled to protection; and, when one of two innocent persons must suffer, by the fraud of a third person, it is but just that he should sustain the loss who gave his name to the negotiable security, and permitted it to go into circulation. Chitty on Bills, 90 (9 Am. ed).

In this case, tested by the reason and spirit of the rule, it can not be difficult to come to a just conclusion, and we would have supposed that, were it not for some recent *dicta* of courts, the case would be plainly with the defendant in error.

In the case of *De La Chaumette v. Bank of England*, 9 B. & C. 208, the plaintiff brought trover for a bank note, which had been presented to the bank, and by it detained, on the ground that it had been stolen. The court held, that the bank, having proven the note to have been stolen, it was incumbent on the plaintiff to prove that he gave *full value* for it.

The principle on which this case was decided can be seen at a glance. Suppose the plaintiff to have been the thief, it is very evident, is it not, that he could not recover under any circumstances? Well, suppose him to have been the indorsee of the thief, and that he had not given a valuable consideration for the bill, the question then turns on the equities of the parties, and the question, "Did the indorsee part with his money or his property, and did he incur loss, or create new responsibility?" naturally arises, and is determined in the negative; and, from this state of facts, it is adjudged that the plaintiff can not recover. Thus, the plaintiff was thrown back on the title of the indorser, as it were, and the *onus probandi* lay on the plaintiff to prove a *full value* paid; and unless he done so, that he had no superior equity. Then, it

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may be asked, has the plaintiff in error proved that he paid *full value* for this \*note? If he took the note for a *precedent debt*, [185 he has paid *no value*. He has parted with *no money, or other property*; and, it was no discharge of the precedent debt, unless the note was not only taken in its payment, but at the time it was *expressly agreed* between him and Benham that it should be an *absolute discharge* of the debt. The taking of this note, then, leaving the *precedent debt* precisely as it stood before, so far as *the record* shows, the plaintiff in error is not within the reason or protection of the rule of law in question.

A bill of exchange, or promissory note, either of the debtor or any other person, is not payment of any precedent debt, unless it be so *expressly agreed*. 5 Johns. 68; 7 Johns. 311; 9 Johns. 310; 8 Johns. 389; 11 Johns. 513; 12 Johns. 409; 6 Cranch, 264; 12 Pet. 57; 1 Salk. 124; 8 Ohio, 528; 8 Conn. 472.

The record in this case shows no such agreement, therefore the plaintiff in error is not an indorsee for a *valuable consideration*, within the reason of the rule; and we wish it to be borne in mind by the court, that a note *in such case*, according to the authorities, although taken in *payment* of a *precedent debt*, is not *payment* unless so *expressly agreed* at the time, and then only on the principle that an individual has a right to "discharge his debtor without any consideration." 6 Cranch, 254.

"A distinction is also taken between a third person, who takes a note or bill from another, and has actually advanced goods or money on the credit of the bill or note, and where he has not done so, but is merely a *creditor on a former account*. In the latter case, he is frequently to be considered merely as an *agent*, and not a holder for *value*, and must therefore prove his debtor's right to the security, where it has been *unduly obtained*, or lost or stolen." Chit. Bills, 92, 9 Am. ed.

The jury having found that the note in question was *fraudulently* obtained, is not the last quotation from Chitty directly in point? It most certainly is, if law ought to settle this \*question, for [186 this is the identical kind of a case contemplated by the learned author.

The statute (Swan's Stat. 589) enacts, "that no bill of exchange, or promissory note, that shall be drawn or made after the passing of this act, shall, though it may have been given for a *usurious consideration*, or upon a *usurious contract*, be void in the hands

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of an indorsee, for a *valuable consideration*, unless such indorsee had, at the time of indorsement, actual notice of such usurious consideration," etc.

This statute, the court will perceive, was passed to alter the common law on that subject; and after its passage, in an action on a bill or note drawn or made after it was passed, by an indorsee against the maker, if the defendant should succeed in showing that such bill or note was founded on a usurious consideration, then the plaintiff was required to show that he gave *value* for it. Chit. Bills, 110, 9 Am. ed.

In the case of *Vallance v. Siddell*, 2 N. & P. 98, the precise question was raised, whether an antecedent debt was a valuable consideration within the meaning of the term as used in the statute (p. 589, 3, C. 93), and the court there decided that the statute only protected *bona fide* holders of bills or notes tainted with usury, who have *discounted* such bills or paid valuable consideration for them at the *time of indorsement*, "and does not include a *bona fide* holder who has taken such bill *in payment* of an *antecedent debt*." See also Chit. Bills, 111, *a*, note at the bottom, 9 Am. ed.

Here, then, this identical question has been settled by the highest judicial tribunal of England, a country of all others in the world the most famed for its legislation and its judicial decisions in favor of commercial advantage; and in accordance with this principle, cases have been decided in the English courts for more than two hundred years.

In *Heath v. Samson*, 2 B. & Ad. 291, it was held that *in all cases* where, from a defect of consideration, the original payee can not recover, the indorsee, to recover, must prove on the trial that he gave *value* for the bill or note. The same is held in 4 B. & C. 325. 187] \*The case of *Patterson v. Hardover*, 4 Taunt. 115, was an action by an indorsee on a bill of exchange, which, or the proceeds of which, had been embezzled, and for which the defendant had received no value. In this case Judge Heath says: "That even in this case of simple loss consideration must be shown, as in *Samson v. Weston*. In the case of *Miller v. Race*, *Grant v. Vaughan*, etc., there was proof that a valuable consideration had been paid by the holder, but not so in this case. If it were in no case necessary to prove *consideration paid*, all the banking houses in London would be converted into *receptacles for stolen bills*." "And Mansfield, in the course of the argument (in the same case),

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said it had been ruled over and over again that consideration must be shown." And Judge Heath said: "The law had been so settled these one hundred and fifty years."

In the case of *Fancourt v. Bull*, 1 Bing. N. C., 27 Eng. C. L. 543, 681, the court say that a lawful possession and indorsement, unless the indorsement was for *value* and without notice, would give the indorsee no better title than this indorser had, and not a title against the world. In this case, it will be observed, that the bill was given for a pre-existing debt.

In *Chitty on Bills*, 937, 938, the author says that "in an action on a bill of exchange, by an indorsee, if it appear that the defendant was *defrauded out of it*, or made it under *duress*, or received *no value* for it, the plaintiff must be prepared to prove for what value he became the holder."

In *Collins v. Martin*, Chief Justice Eyre says that "if it can be proved that the holder gave no *value* for the bill, then, indeed, he is in *privity* with the first holder, and would be affected by everything which would affect the first holder. This is saying, 'You have the title, but you shall not be heard in a court of justice to enforce it against good *conscience*.'"

Numerous other cases might be referred to in the English reports, but it is unnecessary.

It would appear, then, that if this cause were pending in "judicial tribunals" of that country, the plaintiff in error would \*certainly fail. A precedent debt is not a *valuable consideration*. [188  
ation, within the meaning of that term, there.

Then why should *we*, in Ohio, extend a law founded on commercial policy further than England? *Their* interests are, in the main, *commercial*, ours *agricultural*. It is from England that Ohio and her sister states derive their notions of commercial law, and is it reasonable, or can it be good policy for us to go further in that direction than England?

In consonance with this view of the case, New York, one of the greatest and most commercial of our sister states, has regulated her policy. That a *precedent debt is not a valuable consideration*, within the meaning of the term, as applicable to this class of cases, has been decided and approved again and again in the highest court of that state. 3 Johns. Ch. 260, 263; 6 Wend. 622; 9 Ib. 172; 10 Ib. 85; 12 Ib. 600; 13 Ib. 606; 16 Ib. 661; 21 Ib. 499, 500.

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In 8 Ohio, 528, the court decide similarly the same question.

In the case of 11 Conn. 388, the note was indorsed to the plaintiff, *in part*, for the payment of a precedent debt, and *in part for goods delivered at the time*. Consequently, the question now under consideration was not properly before that court. And in 5 Conn. 521, that court having made what we claim, at least as would seem, a decision in favor of the doctrine we advocate, the case in 11 Conn. ought not even to be considered as the judgment of that court on the question at issue here. The case in 11 Conn. was decided correctly, from the facts presented, because the plaintiff had parted with his goods on the faith of the defendant's promise, and thus had given *value* for the note. The *dictum* in 11 Conn. is based principally on the cases of Payson v. Coolidge, and Townly v. Sumrall. The court will perceive that, in the first of these cases, founded in 2 Wheat. 66, 73, that the defendant had no defense, either as against the *payee* or *indorser*, and no such question thought of, as presented to the court in this case. And, in the latter case, found in 2 Pet. 170, 182, a *full and valuable consideration* was given at the *\*time* for the bill. And if the question did arise, in either of these cases, it was improperly up; but it would seem that the court had no idea of deciding this question.

Just so in the case of 16 Pet. 1. The bill was, by Norton, indorsed to the plaintiff, in payment of a note made by Norton and *Kei h*, and not in payment of a note made by *Norton alone*. Thus the court will at once perceive, that the plaintiff incurred risk, Norton alone being liable on the indorsement. And it also appears, that the note of Norton & Keith, for which the bill indorsed by Norton was taken in payment, was *canceled*, thus bringing even this case within that of the Bank of Salina v. Babcock, 21 Wend. 499. "Such *cancellation* is equivalent to *paying value at the time*, and precludes all defense as between the original parties." 21 Wend. 499. And, for anything that appears, this was what was meant by the court, in the case in 16 Pet. 1. But, if in this we are mistaken, all that we will venture to say, is, that the opinion of the court is against good conscience, and not reconcilable with adjudged cases, and that the supreme court of no state ought even to be asked to make any decision, inequitable in itself, and against well-established principles of law, *merely* for the purpose of having them coincide with the federal courts, much less to reverse a decision correctly made for such purpose. This court



decided the case of *Riley et al. v. Johnson*, in 8 Ohio, strictly according to the *reason* and *spirit*, as well as the very terms of the rule of law governing this class of cases; and, by applying the only proper test, it was adjudged that a *precedent debt alone* was not such a consideration as would make the equity of the indorsee superior to the maker.

"There are but two cases in which a bill or note is void in the hands of an *innocent indorsee*, for *valuable consideration*, and these cases are, when the consideration in the instrument is *money won at play*, or it be given for a *usurious debt*." 3 Kent's Com. 79, 3 ed.; 1 Strange, 155; Doug. 636, 736; 3 Johns. 206, 1 Bay, 223. However, this principle has been modified in England and New York, by statutory provisions; but would, no \*doubt, [190 be the law of this state, in the absence of statutory enactments, if we had here usury laws.

Here, then, we have a class of cases in which a defense may be made, even against an *innocent indorsee*, who has paid *full value*, and that, too, by the maker who has received a *full value* for the security, less the excess beyond legal interest, and who is a party to the usurious contract, made in violation of the law. If this class of cases should be favored as an exception to the general rule, much more should be favored that class where the indorsee receives the security in payment of a *precedent debt*, and consequently without paying any *consideration* whatever, with notice, at least of the law, and where the maker has been entirely defrauded out of it—he therefore making his defense. And with what justice can it be claimed that commercial interests are more injuriously affected in this latter case than in the former?

Wood, J. The reasons assigned for the motion are:

1. That it was proved, on the trial, that the note on which the suit was brought, was assigned by Benham, the payee, to the plaintiff, before due, and without notice of any matter of defense.
2. That the court instructed the jury, if the note were so assigned, and in payment of a *pre-existing debt*, the defendant would be entitled to make any defense against the note in the hands of the plaintiff, that he could make if the suit were in the name of the *payee*.

This motion, it will be seen, therefore, presents the question for the consideration of the court, *whether the transfer of a negotiable*

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*note, before due, and without notice, and the consideration of the transfer a precedent debt, subjects the indorsee to all the equities existing between the original parties?*

The identical question was before this court in 1838, in the case of *Riley & Van Amringe v. Johnson et al.*, 8 Ohio, 526. It was then held, that to protect the indorsee against the equities of the maker, the consideration must be actual; the holder must have 191] incurred \*loss, by giving credit to the paper, or by paying a fair equivalent for it. If neither was done, while the condition of the holder was improved, if a recovery was had, and the note taken merely for a pre-existing debt, by a failure to recover, nothing was lost, the condition of the plaintiff remained without change. The same question had been decided in the same way, by the Supreme Court of New York, 10 Wend. 86. And in the court of errors, in the same state. 20 Johns. 637. And the rule there was considered as settled upon a safe and unanswerable foundation. Several adjudications followed in that state, in which the same doctrine was unequivocally maintained. 12 Wend. 600; 13 Ib. 605. Judge Story, however, thinks it questionable whether the above authorities carry the principle to the extent which has been claimed, though he says, from that period, for a series of years, it seems to have been held by the Supreme Court of that state, that a pre-existing debt was not a sufficient consideration to shut out the equities of the original parties, in favor of the holder. Recent cases, however, in the same tribunal, have shaken in a measure the authorities to which I have referred. 21 Wend. 490; 24 Ib. 115; 1 Hill, 512; 2 Ib. 140.

In 16 Pet. 1, the question was decided by the Supreme Court of the United States at the January term, 1842. The authorities, English and American, are critically and ably examined; and, in giving the opinion of the court, Mr. Justice Story remarks: "We have no hesitation in saying that a pre-existing debt does constitute a valuable consideration, in the sense of the general rule, as applicable to negotiable instruments. That it is for the benefit of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass, not only as security for new purchases, and advance made upon the transfer thereof, but also in payment of, and as security for, *pre-existing debts.*"

It is believed that the law, as thus settled by the highest judi-

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cial tribunal in the country, will become the uniform rule of *\*all*, as it now is of *most* of the states. And, in a country [192 like ours, where so much communication and interchange exists between the different members of the confederacy, to preserve uniformity in the great principles of commercial law, is of much interest to the mercantile world.

In the case of *Riley et al. v. Johnson et al.*, 3 Ohio, 526, the plaintiffs were not entitled to recover, aside from the principle which I have before stated, as laid down in that case. The evidence was irresistible, that the notes on which the suit was founded, were not received by the plaintiffs, *bona fide*, but that the entire transaction was founded in fraud.

The point, however, being made and decided that a *precedent debt* was not a sufficient consideration to protect the holder, without notice, against the equities of the original parties, that decision is overruled, and the reverse now holden to be the law.

In the instructions given to the jury, in the case at bar, the court, in our opinion, erred, and a new trial must be awarded, with costs to abide the event of the suit.

New trial awarded.

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WILLIAM D. BELL AND WIFE v. JOHN DUNCAN, DANIEL DEAN, ET AL.

Where a patent for land, issued by the United States, recites assignments by persons competent to convey, there is no presumptive notice, to one who derives title under such patent, of latent defects in the assignments. The defense of *bona fide* purchaser is available to one deriving title under such patent. It is otherwise, if the patent recites assignments by persons not competent to convey title.

THIS is a bill in chancery, from the county of Greene.

The complainants filed their bill to obtain the legal title to a part of sundry tracts of land granted by the United States, \*in [193 satisfaction of Virginia military land warrant No. 3,286, for 2,666½ acres of land, issued to John McAdams, for services as a lieutenant in the war of the revolution. McAdams, by his will, made his sister Charlotte his residuary legatee, under whom both parties to this suit claim title.

These patents were issued, in 1819, to Thomas Watson, and also to Nancy, William, James, and Sarah Ann Payne, heirs of

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Sarah Ann Taylor, one of the daughters of the legatee, and contain a recital that the right of McAdams "has been assigned, in part, unto the said Thomas Watson, by Thomas Taylor and Martha Conway Taylor, his wife and also by Robert Nutt and Charlotte M. Nutt, his wife, formerly Charlotte McAdams Taylor, which said Martha Conway Taylor and Charlotte M. Nutt, together with the aforesaid Sarah Ann Payne, formerly Sarah Ann Taylor, are the only children and heirs of Charlotte Taylor, deceased (formerly Charlotte McAdams), the sister and legatee of the said John McAdams, deceased."

It appears, by a certified copy from the office of the commissioner of the general land office, that the assignment of Martha C. Taylor and her husband, and of Charlotte M. Nutt and her husband, were executed in Virginia, in 1819, under seal, and acknowledged before a magistrate in this form:

"Robert Nutt and Charlotte M. Nutt, this day personally appeared before me, C. W., a justice of the peace," etc., "and acknowledged the above instrument of writing to be their act and deed; given," etc.

There was no separate examination of Martha C. Taylor and Charlotte M. Nutt apart from their husbands. Before these assignments were executed, the warrant had been located and surveyed, and the land embraced in the patent thereby appropriated.

The defense set up by the defendants, who claim title adverse to complainant, is, that they are *bona fide* purchasers of the legal title, for valuable consideration, without notice of any defect. The lands have been occupied and improved by them, and those under whom they claim, since the year 1816.

194] \*A. HARLAN and WILLIAM ELLSBERRY, for complainants.

ODLIN & SCHENCK, for defendants.

The points made, and the cases cited and reviewed by the counsel, are noticed in the opinion of the court. The arguments are, therefore, omitted.

BIRCHARD, J. There is nothing in the proof to create a suspicion, that the sum paid by Watson, in 1816, amounting to about \$2,000, was not, at the time, a fair consideration, for the interests of Mrs. Taylor and Mrs. Nutt; and we may suppose it was honestly and fairly intended that the sale should be made effectual by the assignment then executed.

The proof does not charge the respondents with notice of any

defect in the legal title. Unless the recitals of the deed are, in law, presumptive notice, they had none.

In the opinion of my brethren, the case is with the complainants, and they are entitled to a decree, if notice to the defendants can be established.

In behalf of complainants, it is urged, that the recitals of the patent are sufficient to charge the defendants with notice. It is alleged that the rule is well settled. The nature of the question, and the very important bearing it must have upon, perhaps, twenty millions of property within this state, the titles to which have been granted on assigned entries, certificates, and warrants, require, at our hands, a careful examination, whether or not the rule contended for is as inflexible as is supposed. The case of *Brush's Adm'rs v. Ware*, 1 McLean, 535, was a case between the heirs at law of one Hackaday, entitled to a Virginia military warrant, and the assignee of the warrant. It is relied on by complainants as conclusive. Judge McLean remarks: "This is not a controversy between a claimant under Hackaday and a stranger to the claim. It might well be doubted, whether a person claiming adversely to Hackaday's assignee, could go into the validity \*of the assignments, either before or after [195 the issuing of the warrants. As between such parties, the entry and patent might be conclusive."

The case showed that Brush, the patentee, was connected with the claim before the patent issued; and, before patent, he, of course, had but an equity, which could not defeat an equal equity of prior date. The case was taken to the Supreme Court of the United States, and the decision affirmed. 13 Pet. 93. This decision is also cited as conclusive. We have carefully examined the case, and the reasons given by the court. So far from its being decisive of the merits of this question, it is certain that the point here made by the respondents did not arise in that cause, and was not before the court. On page 108, the case is put upon this ground: "Until the patents were obtained, this warrant, through assigned and entered, in part, on the land in controversy, conveyed only an equitable interest." All the remarks of the judge, in pronouncing the opinion of the court, should be considered in reference to the case then on trial. It was a case where lands had been entered, in the name of George Hoffman, in 1809, and patented in 1818, to "Brush, assignee of John Hoffman, who

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was assignee of Joseph Hoffman, and others, assignees of George Hoffman, who was assignee of J. Ladd, assignee of R. S. Ware, executor of Hackaday." The difficulty was, that Brush, being an assignee before the patent issued, had but an equitable right to demand a legal title; and the paper evidence of his equitable (not legal) right to the land, showed that a deed from Ware, an executor, who had no control over such property, and whose conveyance was void, was one link in his chain of title. The recital showed no authority, on the part of the executor, to make such a transfer. The law being clear that an executor could not convey real property, and every one being bound to know the law, it was rightfully presumed that Brush had notice that an executor's deed did not divest the heir. "Can it be contended (say the court), that the defendant, who purchased an inchoate title, a mere equity, was not bound to look into the origin of that equity? To us, 196] \*it seems that these cases, rightly understood, make for the respondents. The case of Reeder et al. v. Barr et al., in 4 Ohio, 496, also relied upon, seems to be clearly distinguishable from the present. In that case, the patent was issued to Newell, as assignee of the administrator of Hanson Reeder;" the court held that the recitals in the patent were notice to a subsequent purchaser, sufficient to put him on inquiry, because an administrator had no right to sell the land. "If," say the court, "the assignment of an administrator, *per se*, conveyed the equitable rights of the intestate, the purchaser might stand in a different situation." The cases in 9 Cranch, 98, and 5 Wheat. 304, deciding that the existence of a grant is presumptive evidence, that every prerequisite has been performed, are cited with approval, and the decision is placed upon the distinct ground, that the patent shows, upon its face, that the heirs of Reeder were owners of the estate, after his death. These patents show no such defect. The assignments recited, were those of persons who had an interest, and who could convey. The next case relied on by complainants is that of Bonner v. Ware, 10 Ohio, 465. It presented to this court, for consideration, the same patent referred to in 15 Pet. 93. The complainant, Bonner, sought, by his bill, to quiet the equity of the heirs, by setting up that he had an equal equity, though junior, coupled with the legal title acquired, *bona fide*, for a valuable consideration, and without notice of the elder equity of the heir. The bill was dismissed, not on the ground that the doctrine of *bona fide*

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purchasers is a weapon of defense, and not of attack, but upon the authority of the cases in 4 Ohio, 446; 1 McLean, 535, and 15 Pet. 93; which decisions were concurred in, and, beyond the principles, as therein held, it was not, as I am informed by the judge who pronounced the opinion, intended to go. It is, however, said, in that opinion, that the case of *Reeder v. Barr et al.*, 4 Ohio, held "*that the rule of notice applied to patents, as to private deeds.*" The rule spoken of, was the rule which I have above explained. That every purchaser is \*presumed to have notice of any [197 defect of title, apparent upon the face of his patent; not that he is required to look for a latent defect in the chain of assignments recited in the patent, where such assignments purport to have been made by the proper persons. This would defeat the law, recognized in the case of *Reeder v. Barr*, 4 Ohio, as correctly settled in 9 Cranch, 98, and 5 Wheat. 304. It would, in effect, be to set up a presumptive notice, against the legal presumption, that, in executing the grant, the president of the United States performed his official duty; a presumption which the patent, issued by him, if regular on its face, raises in favor of the patentee, and upon which it is safe for subsequent purchasers to rely. A contrary rule would work immense injury to the holders of real estate derived from the general government, and to the public. The amount of mischief it would produce in the Virginia military district can hardly be imagined. Bill dismissed.

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## DARIUS TALMADGE v. THE ZANESVILLE AND MAYSVILLE ROAD COMPANY.

Where passengers, injured by the upsetting of a coach, have recovered against the proprietors, the damages assessed in such action can not be recovered, by the coach proprietors, from the road company, for failing to keep the road in repair, which, in some degree, occasioned the accident; but a recovery may be had for the injury done to the coach.

'THIS is a writ of error to the Supreme Court of the county of Fairfield.

Talmadge brought his action against the road company, alleg-

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ing that he was the proprietor of a coach for passengers, which was 198] upset by reason of an insufficient road made by the \*company, and whereby his coach was injured, and a passenger, by the name of Maury, hurt, who recovered of him a judgment for \$2,300, which, with the other damages, Talmadge now claimed to recover from the company in this action.

On the trial, in the common pleas, Talmadge offered to the jury the record of the recovery against him by Maury, the passenger. The declaration, in that case, counts against Talmadge for his negligence, in overloading his coach, driving in the night without lights, etc.

The road company objected to the admission of this record, but the court overruled the objection, and admitted the evidence.

A verdict was had in favor of Talmadge, and judgment for \$2,300. On error to the Supreme Court, the judgment of the court of common pleas was reversed, and this writ is now brought to reverse the judgment of the Supreme Court.

H. H. HUSTON, for plaintiff in error:

The ground assigned by the court on the circuit, for the reversal, was exclusively upon the admissibility of the record of Maury v. Talmadge in evidence to the jury, the court holding it to be incompetent.

The reason assigned against its competency, we understand to be, that the *gist* of the action of Maury v. Talmadge was the *negligence* of Talmadge. Hence, if Talmadge be now permitted to recover over, against the road company, the damages which Maury recovered against him, he will, in effect, be allowed to recover damages against the road company for his own neglect. And this, we understood the court to say, could not, on principle, be allowed in any case.

It is in holding these propositions, we suppose the court to have erred; and we do not now propose to discuss any other questions which might arise upon the record. For, although we would claim that, taking the whole record, or the whole charge of the 199] court together, there is no error of which the \*opposite party can avail himself, if the one above referred to be not such; yet, surely, any others which may exist would only result in remanding the case. But, if the error above named be really an error in the case, it takes away the cause of action, and is final.

In order to be clearly understood in what we have to say upon



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the question for consideration, we wish, in the first place, to draw the attention of the court to the different *degrees* of *negligence*, by reason of which a *carrier of passengers* and *one who obstructs a highway*, are, in law, holden liable in damages to others, who suffer an injury from their want of care.

The carrier of passengers is holden to the observance of the *utmost degree* of care, and is liable to those for whom he undertakes, for injuries resulting from the *slightest* negligence. Story on Bailments, 379, where the authorities are collected. McKinney v. Neil, 1 McLean, 552.

On the other hand, one who obstructs a highway is not liable in damages to one injured by the obstruction, unless it appears that the party injured, in passing the obstruction, himself, used *ordinary* care. The negligence of the party, in placing the obstruction, may be gross. He may even place it by design, as an obstruction, yet, if a passer by will, heedlessly, and without ordinary care, run upon it, and be thereby injured, he has no right to complain, and can not make him who transgressed in placing the obstruction, respond in damages. Smith v. Smith, 2 Pick. 621.

But if, in passing such obstruction, one, in passing, shall use *ordinary* care, and receive an injury by reason of the obstruction, he is clearly entitled to his action against the party placing the obstruction. Co. Lit. 56, a; Buller's N. P. 78.

These propositions are indisputable, and we think it necessarily flows from them, as a logical consequence, that a carrier may be liable to his passenger for an injury happening under *slight* negligence on the part of the carrier, but chiefly depending upon an obstruction to the highway, placed by a third party. And that, if the carrier, in passing the obstruction, had used *ordinary* [200 care, the party placing the obstruction will be liable over to the carrier.

If we remember accurately, it was said by the court, in deciding the case upon the circuit, that the liability of Talmadge, the carrier, to Maury, his passenger, was founded upon the neglect of Talmadge, and that Talmadge could not, in law, have been liable to Maury, if it had appeared that the obstruction in the road gave rise to the injury. That in that state of the case, the remedy of Maury would have been against the road company, who caused the obstruction, and not against Talmadge. The idea was also advanced, we believe, that such evidence as would fix a liability

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in favor of Maury, against the road company, would be a defense in behalf of Talmadge against the claim of Maury.

We may not have gathered the exact expression or idea intended to have been conveyed, but believe it was, essentially, as above stated.

The views thus attributed to the court are, obviously, at variance with the positions we have expressed above, and which, we think, are sustained by authority and reason.

We think it is very clear that such a state of facts might readily exist, as would entitle Maury to his action against either Talmadge or the road company.

For instance, if Talmadge, in passing the obstruction, did not use the highest degree of care, and, in consequence of the want of such care, the accident happened, Talmadge would be liable to Maury. So, if Talmadge, passing with Maury in his coach, used *ordinary* care, and, in so passing, the accident happened, in consequence of the obstruction, the road company would be liable to Maury. It is very certain, at all events, that, under such circumstances, the road company would be liable to Talmadge for any injury he might sustain to his person or property. And, if so, it is difficult to perceive upon what principle Maury, passing in the coach, and receiving injury, should be excluded from having redress against the road company, upon the same footing that Talmadge would. Although in the coach, as a passenger, yet he 201] would bear with \*him his personal rights. And if the vehicle by which he was conveyed was, at the time, managed with *ordinary* care, it must be admitted that he, passing in that vehicle, would be passing with *ordinary* care. Yet, because Maury would thus have his right of action against the road company, under these circumstances, it by no means follows that he would be deprived of his right of action against Talmadge, for not exerting the highest degree of care, which it was Maury's right to exact of him.

This view brings us close up to the main point relied upon against what we claim, to wit, that Talmadge was bound to Maury, to exert the highest degree of care, and if he did not do so, and has responded to Maury for the consequences, he has only responded for his own negligence, according to the legal nature of the engagement he was under to Maury; and, hence, that he

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ought not to be permitted to recover back, from the road company, the damages he has had to pay for his own neglect.

There is, we admit, in this mode of stating the proposition, a good degree of plausibility. Yet it is not we think, a very difficult matter to show, that it is unsound, and wholly untenable.

Talmadge, it is true, incurs the liability on the ground of negligence. But that degree of negligence by which he was liable was, or might have been, a purely legal, technical negligence; not negligence in fact, but negligence merely because it was possible, by the exertion of the utmost prudence and care, to have avoided the difficulty.

The highway is obstructed; and, in consequence of the obstruction, more vigilance and care is necessary to pass it safely than would otherwise have been necessary. As between the carrier and his passengers, the carrier is bound to apply all the care necessary under the existing circumstances to insure safety. But the obstruction has been wrongfully placed there by a third party. It may be passed with extreme care, but can not, with reasonable and ordinary care, in safety. A party attempts to pass it—must, in the progress of his necessary and lawful business, pass [202] it. He uses ordinary, and reasonable care, but suffers an injury. Now, in common sense, reason, and justice, what has been the real and true cause of the injury, and upon whom in fact, and truth, does the blame rest? It would seem almost impossible not to see the subject in its proper light.

In morals, upon whom, of the parties in fault, should the ultimate burden rest? One is chargeable with no moral neglect of duty; the other has done an act which all must pronounce an outrage upon the public. Shall he who has committed the real wrong, and is, in truth, the only one to whom guilt attaches, be suffered to shield himself from liability, by the pretext that is here set up, that the party who seeks to hold him accountable is, himself, chargeable with negligence—with a violation of his legal duty to another?

This idea, or the idea of his defense, is out of place in such a case. It may, properly enough, be applied in cases between wrong-doers who have acted in concert, or between doers of *positive* wrong, whether acting in concert, or independently. In such cases, or between such parties, the defense would be in place.

The breach of duty, on the part of Talmadge, as between him-

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self and Maury, was more in the nature of a breach of contract than a wrong. It arose out of contract, and an action upon the contract might have been sustained for the same damages.

It may, therefore, with all propriety, we think, be said that the wrongful act of the road company has wrought upon the defendant a breach of his contract, thereby causing him a special damage and injury, which, otherwise, would not have happened to him and, therefore, the burden of which they should sustain.

Cases may readily be supposed, involving the same principle, but, perhaps, better adapted to illustrate the principle than the one before the court.

A common carrier of goods is liable, on legal principles, to his employer, for loss or injury to the goods, although the loss 203] \*happen without his fault, and through the wrongful act of a third party. A cargo of goods is received by a carrier, on his canal-boat, to be carried. They are stolen by a thief—destroyed by an incendiary—or, if they are to be carried upon a canal owned by an incorporated company whose duty it is to keep the canal in navigable order, they may be wet and damaged, by reason of the canal not being in proper repair. The owner brings his action on the case against the carrier, and declares against him, in the usual form, that the loss or injury happened by "*his mere carelessness and negligence.*" The owner recovers, of course. Has the carrier no redress against the wrong-doer? The *gist* of the action, in contemplation of law, is *negligence*. In the action of the carrier, against the real wrong-doer, may he not, as a measure of damages, give the record of the recovery against himself in evidence? Surely we think he may. All other questions of fact are open. The record, offered as a rule of damages, leaves undisturbed the question, whether the supposed wrong-doer be in fault or not; and the averment, in the declaration, against the carrier, of negligence, although legally true, can form no just excuse to the wrong doer.

We can not perceive a shade of difference, in principle, between such a case and the one at bar. But we are not without authority in analogous cases.

A sheriff is charged with the custody of a debtor upon execution. If he *voluntarily* suffer the prisoner to escape, he is liable to the plaintiff in damages. In such case the escape being *voluntary*, the sheriff has no recourse upon the debtor. But if the sheriff suffer the pris-

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oner to escape by *negligence*, the sheriff may recover over against the debtor who escaped, and may show the record of the recovery against himself as a measure of damages. 10 Mass. 59. Yet in the action against the sheriff, *negligence* is the *gravamen*. The substance of the thing is that the debtor who escaped, is the real wrong-doer.

In the case of the Commissioners of Brown County v. Butt, Sheriff, 2 Ohio, 355, the sheriff was held liable for a *negligent escape*. [204 cape, which happened in consequence of the want of a sufficient jail. He was allowed to recover over against the commissioners of the county, whose duty it was to provide a sufficient jail; and the record of the recovery against the sheriff was the measure of damages.

Here, again, the real thing is duly regarded.

It will, of course, be remembered that all the benefit we claimed from the introduction of the record was, to use it as the measure of damages. This could obviously be done without any prejudice to the rights of the parties, upon the question of fact as to the cause of the injury. As to this, it could have no legal tendency one way or another. But if it had, it would be against the party offering it. The plaintiff would be bound, in order to entitle himself to recover, to satisfy the jury by proof that the obstruction produced in the road was the cause of the injury; and the defendant, on the other hand, would be at liberty to show that it arose from the want of ordinary care on the part of the plaintiff.

In conclusion, we submit that the record was properly received in evidence, and that although the court may have erred in charging the jury that they might apportion the damages, yet the whole charge, taken together, placed the law properly before the jury.

At most, if the charge was erroneous in respect to apportioning the damages, a reversal for that cause alone leaves us entitled to have the cause remanded for further trial.

H. STANBERRY, for defendant in error:

A carrier of passengers is not an insurer. The law for the protection of his passengers imposes upon him the duty of using the the greatest degree of care. McKinney v. Neil, 1 McLean, 550.

Where a passenger is hurt, he can only recover of the proprietor by proof of the want of that degree of care which the law requires. The recovery in Maury v. Talmadge must have proceeded upon such proof. If Talmadge had shown \*that the upset [205

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was caused by an insufficient road, without fault on his part, there could have been no verdict against him.

The verdict and judgment in that case, therefore, establish *his* negligence—*his tortious omission* of that degree of care, in the transport of his passengers, which the law demanded.

If the road company failed in their duty by not providing a safe road, does that excuse Talmadge for failing in his duty to use extreme care in driving his passengers over it? Shall the company, though equally in fault, indemnify Talmadge from the damages which a jury awarded against him for his own negligence?

If that be so, there is an end to the safety of the passenger. The coach proprietor, when he approaches a bad road, at the very time when the extreme care, required of him by the law, is most necessary, may very safely omit that degree of care, with the certain assurance that, if he use but ordinary care, every cent which the injured passenger recovers from him he can recover, back from the supervisor or road company. It would be against the policy of the law; and tend to encourage negligence in the performance of a duty in which the lives and safety of passengers are concerned.

Where a passenger is injured by careless driving over a bad road, he has an election which to sue, the road company or the coach proprietor. Both are guilty of negligence, and the passenger, being wholly without fault, may look to either; but the road company can not have recourse over upon the coach proprietor, nor the coach proprietor upon the road company, either for full indemnity or contribution. The law will assist neither, as both have been in fault.

It is a well-settled principle that one *tortfeasor* shall have no contribution against another.

Again, where an injury happens from negligence of two or more, no one of them, who has been at all in fault, or guilty of any negligence, can look to the other, although that other is the primary cause of the injury. 22 Eng. C. L. 280.

206] \*It is said, in behalf of Talmadge, that the law requires from the person passing over a highway only *ordinary* care, and if, with such care, an injury is sustained by reason of an unsafe road, he may recover against the person whose duty it is to keep up the road.

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We admit such to be the rule, and, so far as the *immediate* damages are concerned (that is, the breaking of the coach, etc.), Talmadge may recover of the company, although he only used ordinary care. A very different question arises upon this transcript.

The damages recovered in that are consequential. They are given against Talmadge, not because of an unsafe road, but that, in conducting his coach over such a road he was guilty of negligence, and omitted the degree of care which the law imposes upon the carrier of passengers.

If the traveler uses no more than ordinary care he is in no fault; and if injured, the law will, therefore, relieve him; but if the carrier of passengers uses only ordinary care he is in fault, and the law will not assist him.

Again, how does it appear that the verdict in *Maury v. Talmadge* proceeded upon the ground, or proof, that ordinary care was observed by Talmadge, making him answer only for the want of that greater degree of care which the law requires? Nothing but the transcript of the record was produced, and that shows a case of carelessness of the most culpable sort, overloading, want of lights, etc. No proof was added to show on what sort of carelessness the jury, in that case, proceeded; only it did appear afterward that there was proof of carelessness, on the part of Talmadge, in the case of *Maury v. Talmadge*, which was not before the jury in the case of *Talmadge v. The Road Co.* Talmadge undertook to prove to the jury, in his case against the road company, that he used ordinary care. Admit that he succeeded in establishing that fact in this case, does it follow that he is entitled to recover the damages which were assessed by another jury upon other proof? How could this jury determine upon what ground these damages were assessed, not having before \*them the [207 proof of carelessness which was made to that other jury? How do we know the degree to which the damages were aggravated by the proof then made of Talmadge's negligence?

All we know about that case is, that the declaration alleged culpable negligence; that it was sustained by proof of which this jury had no knowledge. The verdict of that jury was given on one state of facts; the verdict of this jury on another; and yet, it is claimed that this jury shall respond to those damages.

It may be that the verdict in *Maury v. Talmadge* was wrong, against the weight of evidence, or founded upon the testimony of

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perjured witnesses. If so, it is Talmadge's misfortune, not the road company's. He had an opportunity of being heard—they had not; and the verdict, right or wrong, was against him, not them.

Mr. Hunter admits the record in *Maury v. Talmadge* establishes negligence in fact against Talmadge. He attempts to find cases in which the party, against whom negligence is so established, may recover over against some third person, and use the record to ascertain the quantum of damages.

First is his case of a common carrier. Now the clear distinction between that case and this is, that the recovery against the carrier does not establish the fact of actual fault or negligence in the carrier. He is an insurer.

Next is the case of escape. I am indebted to the counsel for the suggestion of this case, as it furnishes an illustration of the difference between an actual fault and mere legal carelessness.

If the escape is voluntary—that is, if the sheriff is actually in fault, he can not recover over against the debtor. If it is involuntary, he can.

But, suppose there were actual negligence in the involuntary escape, why should not the sheriff recover over against the debtor?

That right stands upon a different ground from the right to recover in the case at bar. The sheriff is made liable to the [208] \*creditor for the debt, and if he recovers over against the debtor, he recovers no more than the debt. No one pretends that the debtor paid or discharged his debt, by running away or breaking jail.

Why was the sheriff allowed to recover over against the county, in the case of the Commissioners of *Brown v. Butt*, 2 Ohio, 355? Simply on the ground that there was no fault in the sheriff. He, like the common carrier, is made liable in any event. Whether he can recover over, depends on the question whether he had been actually in fault. For if his act has contributed, even in a slight degree, to the tort, he can have no contribution from another who is even more in fault than himself. 22 Eng. Com. Law, 280.

T. EWING, for Talmadge, in reply:

There seems to be an impression that this is a case of a wrong-doer attempting to recover over against another wrong-doer,



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damages to which he has been subjected, partly, at least, by his own unlawful act; but nothing can be further from the truth of the case. The action of *Maury v. Talmadge* was not founded on tort, but contract. It was a contract, which Talmadge can show, entirely consistent with that recovery, he took the ordinary means, and used ordinary care and diligence to comply with, and which he would have complied with but for the obstruction placed in the road by the plaintiffs in error. They, by their wrongful act prevented its performance and subjected him to damages for its breach. The injury was consequent upon the wrongful act of the road company. The damages flowed directly and immediately from the injury.

The undertaking of Talmadge was analogous to that of a common carrier, and the declaration contains like allegations of negligence. Yet no one doubts that the carrier, after a recovery against him, might recover over against one who had caused injury to the goods which he was transporting, precisely as he could recover for his own goods, and upon the \*same state of facts. The [209 owner, it is true, may, if he choose, have his action against the wrong-doer, but he is not compelled to resort to him. He may recover against the carrier, and the carrier may recover over. And neither in the case against the stage proprietor, nor the common carrier, is negligence the gist of action. It need not even be proved. The overturning of the stage and the personal injury in the one case, and the loss or damage to the goods in the other, is sufficient. The defendant is thereby shown to have failed in the performance of his contract, and must show an excuse; in the case of the carrier, that the loss was sustained by the act of God, or the public enemy; in the case of the stage contractor, that the utmost possible diligence and care to effect a performance, and that the breach of contract was occasioned by some casualty which that extreme care and diligence could not prevent.

This is the law of the two cases, as laid down in the books. I can see no distinction between them as to the right to a recovery over, except in the degree of proof, nor any incongruity in allowing a recovery in either one or the other of the cases.

The law recognizes a distinction as to the degree of care required from individuals in different situations, the want of which will render them liable to others for injuries, or disable them from recovering for injuries occurring to themselves. It is not for us

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now to say whether there is anything sound or rational in the distinction. The laws of all civilized countries have recognized it, and it is perfectly well marked and defined in our own legal system. In some cases no more than ordinary care is necessary; in others, the utmost care and vigilance. For example, if Talmadge, passing with his coach, had given a seat, as a mere favor, to any person, he is not free from *all* obligation to such voluntary passenger; but if he become liable to him for an injury happening, it must be upon the ground of *negligence* merely, not of contract, and that negligence must be gross, and it must be expressly proved. In that case the stage-owner would be bound to use ordinary \*care, such as a man of common prudence would use under like circumstances; and if he be guilty of gross negligence, and an injury happen, he will be liable; for, though he may risk his own neck as recklessly as he pleases, he has no right wantonly to expose his voluntary passenger to danger and injury.

But in the case of Maury, Talmadge had bound himself, *by contract*, to carry him safely, for which Maury paid a valuable consideration. If he did not carry him safely, he had failed in the performance of his contract, and was liable to all the damages which Maury sustained by reason of the breach, unless he could show, by way of excuse, that he was well provided with the means to carry his contract into effect; that he made all reasonable exertions to that end, and that at the moment the injury happened he used the utmost care to prevent it.

These cases are separated from each other by a broad margin, perfectly well defined in the law, analogous to that which separates the deposit of goods for compensation from the deposit for the mere accommodation of the depository.

Now, there is a distinction similar to this, and equally well defined, in the degree of care which will enable an individual to recover against a person obstructing a highway, and the care that will excuse him from damages on his contract with his passenger.

This proposition does not seem to be controverted by the counsel for the road company. If it be correct, then Talmadge, on the very same evidence on which Maury has rightfully recovered against him, could also recover against the road company, for the injury done to *his own person*, if he had suffered such injury. *This* does not seem to be denied by counsel. Then the only matter in controversy is, whether, upon these conceded propositions,

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Talmadge, being able to recover for an injury done to his own person, he may not, in some supposable state of the evidence, also recover for an injury done to him *in the person of another*. If his wife or servant, a passenger in his stage, were wounded, and he incurred a surgeon's bill, for setting a joint or amputating a limb, could \*not he recover damages to the amount of that bill, [211 upon evidence on which Maury, his passenger, might also recover against him? I think it very clear that he might. The degree of care to exonerate him, in the one case, and in the other, to charge the road company, is very different. If he used *ordinary care*, he might charge the road company; but he must have used the *utmost care* in order to exonerate himself against his passenger. If he may recover for such expense necessarily incurred by him, because of an injury done to his wife or servant, may he not also recover for a like expense, necessarily incurred by reason of an injury done his passenger; that is, if the injury be the direct and immediate, and not the remote and contingent, consequence of the wrong done him? The verdict and judgment might not be evidence for Talmadge against the company, if the value of Maury's knee could be exactly fixed and shown as the measure of damages, but that is not the case. The contract of Talmadge with Maury was broken by reason of the unlawful act of the road company. *That* was the injury which Talmadge sustained, and it was a direct and immediate injury, produced and consummated at the moment. Is he less entitled to recover for it than if it had been a wound upon his own person? Suppose a mail contractor, liable to a penalty for failing to make his time, some one unlawfully places an obstruction in the road which prevents him, and he thereby incurs the penalty. This injury is more remote than the one of which we complain, but it seems to me that he may recover to that extent. *It* is the damage which he has suffered by reason of the unlawful obstruction, and not more remote than the surgeon's fee for setting a limb, broken by the fall of a horse.

I can see no objection to the right of Talmadge to recover, unless it arise from the doubt whether Maury would elect to bring his action against him, or against the road company, for the injury to him. But he has elected to take his remedy against Talmadge; and the record, rejected by the court, shows that fact. We suppose that his recovery against Talmadge could be well

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212] pleaded in bar to an action by him against the \*road company, for the same injury, the judgment being satisfied.

There are many cases, some even in tort, in which a recovery between third persons can be given in evidence, for the purpose of showing the amount of damages to which a plaintiff is entitled.

If A. convert the goods of B., and C. take them from A., as a trespasser, B. may have his action against A. or C., and recover the value of his goods; and A. may have an action against C. for the trespass, but may not recover the value of the goods, because they are the property of B. But, if B. bring trover against A., and recover, the property of the goods is thereby transferred to A., and A. may thereupon recover the value of the goods against C.; and he may give in evidence the record of the case of B. against him, on the trial with C., to show that he is so entitled.

In the present case, Talmadge offers the record to show the amount of damages he sustained, by reason of the wrongful act of the defendants, and for no other purpose. The wrongful act of the defendants, and that the damages recovered by Maury are the result of that wrongful act, are facts to be proved, of course, by other evidence.

It is admitted, by defendants' counsel, that there is a difference in the degree of *care and skill* which is necessary to exonerate a carrier of persons from damages for an injury done to his passengers by the upsetting of the coach, and the *care and skill* which is necessary to entitle the person passing upon a road to recover for an injury done him by an obstruction wrongfully placed in the road. The distinction is strong and marked. In case of a person passing the road, he may recover damages for an injury sustained by reason of an obstruction, if he use *ordinary care*. In the case of the carrier of passengers, he must use the *utmost possible care*, and he must also according to the language of Lord Ellenborough, in *Jackson v. Tottell*, 2 Stark. 37, "*have used the best and soundest judgment under the circumstances.*" 5 Pet. 56, and cases there abstracted. Thus, even an error of judgment, on the part of 213] \*the driver, at the moment of the emergency, though he be skillful and experienced, renders the owners liable.

The action which is brought for the injury against the carrier is not an action of *tort*, or sounding in *tort*; it is an abuse of legal terms so to designate it. It is an action *upon contract*, and one of the most strict contracts known to the law. A breach of it is no

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*tort*; not nearly so much as the breach of a contract to pay money. For the party entering into it may have made every prudent and effective arrangement to comply with it; he may have the best coach, the best harness, and the best driver that can be procured; and the driver, even at the moment of the accident, may be attentive and vigilant, "*but if he fail to use the best and soundest judgment under the circumstances,*" and an injury happens, the owner is liable. What, then, have we to do with *tortfeasors*, or the law relating to them, in this case?

The counsel for the defendants admits the rule as we have laid it down, and that, "so far as the *immediate* damages are concerned, that is, the breaking of the coach, etc., Talmadge may recover of the company, although he used only *ordinary* care;" but, he adds, "a very different question arises under the transcript." Now I am wholly unable to perceive the difference.

Talmadge may recover against the road company if he used *ordinary diligence*; but what is he to recover? If he may recover at all, he must recover to the full amount of the injury done him, actually and immediately, by the wrong of the defendants. Though the injury be done at once, and on the instant, the amount of *damages* may not be ascertained immediately. For instance—his coach is broken; for that, say counsel, he may recover. He is personally injured; for that, also, I suppose, they will admit he may recover. So, if his wife or his child be injured. But the amount of those damages can not be ascertained until he has paid the surgeon's bill for attending them, and dressing their wounds, etc. And if he thinks the surgeon's charges too high, and he contests his bill in a suit, the amount of the recovery against him, by the surgeon, would \*settle this item of damages, done at the [214 moment of the upset, but not ascertained till verdict and judgment.

But here was a passenger in the coach of Talmadge, for whose safety he is responsible; and whether he is his insurer *at all events*, or his insurer against the particular wrong of the defendant, in manner and effect, as it produced the injury, is, I humbly conceive, a matter of no importance whatsoever. The injury of the passenger formed part of the damage done to Talmadge by the upset, as absolutely and immediately as the damage done to his own person, or to his own wife or child. This damage was done instantly,

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but the extent of it was not ascertained until the recovery in the suit of Maury v. Talmadge.

But it is said, that as the record in the case of Maury v. Talmadge shows that Talmadge was guilty of negligence, he therefore shall not recover as to that matter against the road company. Let us not be misled by words. The counsel has admitted, that, in the very transaction in which this charge of negligence would be sustained, as between Maury and Talmadge, the requisite care and diligence may have been used by Talmadge to enable him to recover against the road company, for what he calls an immediate injury to himself. Therefore, what was negligence as between Maury and Talmadge, is not negligence when the question arises between Talmadge and the road company.

What, then, I ask, has the charge of negligence, in the declaration in the case of Maury v. Talmadge, to do with the case now pending? It does not affect the question in any form whatever. The negligence then charged *may*, or it *may not*, have been that kind of negligence which would exonerate the company; but as it does not, necessarily, exonerate them, the record of the recovery may be admitted in evidence precisely in the same manner, with the same effect, as if no charge of negligence were contained in it. The record proves nothing but an item of damages sustained by Talmadge; it does not prove, or tend to prove, that the defendants are, or are not, liable for those damages. The evidence on 215] that trial \*could be used no farther than merely to show that this particular injury was the ground of the action, and the cause of the recovery.

But what, in effect, is the charge of negligence in the declaration, in the case of Maury v. Talmadge? Surely with reference to the contract and the law which governs the contract. Suppose the effect which the law attaches to it had been set forth in terms in the declaration, and the breach in like terms; that is, in substance, thus: "Yet the said defendant, not regarding his promises and undertakings, did not use *the utmost possible care* to carry and convey the said plaintiff safely and securely on the said coach, on his said journey, but wholly failed so to do; and, on the contrary thereof, used no more than ordinary care and diligence, etc." Could it be contended that here would be such a charge of negligence that the very declaration, in the case in which the damages sustained by Talmadge was shown, would, in terms, exclude him

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from giving the record in evidence? And yet, the general word negligence, in this declaration, means, in legal contemplation, nothing more than a want of the utmost possible care and the utmost human foresight; and the want of skill charged in the driver is only a want of talent or ability to exercise "the best and soundest judgment under the circumstances." As referable to the road company, this is not negligence and want of skill. These words, in the declaration in Maury's case, have no such meaning as applicable to the road company, and it would be merely sticking in the bark to consider them transferable from the one case to the other—give the words in the one case the sense which they legally bear only in the other.

It is admitted, by counsel, that if Talmadge had been a common carrier, and had in his vehicle the goods of a third person, which were damaged by the upset, and the injured person had recovered against Talmadge the value of the goods, the verdict and judgment against Talmadge could be given in evidence by him in this suit; and he admits, in another part of his brief, that Talmadge could recover, too, against these defendants, even in a case where Maury might have recovered against \*him. And why? [216] Because, he says, the common carrier is liable at all events. Now, I do not see the force of this distinction. Talmadge was liable to Maury under circumstances in which the defendants are liable to him, and what matters it whether his liability, over to others, is or is not unlimited? What has the defendant to do with that? The admitted case of the common carrier entirely disposes of the objection that these damages are remote, not immediate. They are just as much the instantaneous result of the injury in the case of the *broken bone* as of the *broken crate*. The amount of damages is alike determined by verdict and judgment.

But the learned counsel contends that it is against public policy to suffer the carrier of persons to recover over against an individual who has placed obstructions in the road, the damages which his passenger has sustained, and which he has been compelled to pay, by reason of the obstruction. And he urges, if such recovery over be allowed, that such carriers will take small care of the safety of their passengers. Now, I do not perceive the danger of such effect following from allowing the recovery, any more than there is from allowing the carrier to recover when his wagon is upset by a like cause and the goods damaged;

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but to deny the recovery will result in gross injustice. It is no matter whether the obstruction be placed in the road carelessly or maliciously; and let the law be as counsel contend, and one man, by obstructing a highway, either through negligence or malice, may ruin another, and, at the same time, render himself in no wise liable; and that, too, in a case where the injured person has used the ordinary care which a prudent man would use to avoid the obstruction.

The allegation that this is a wrong on the part of Talmadge, which thus renders him liable to Maury, that it was his own fault, his own negligence, is, again let me observe, as between these parties, wholly without foundation in the case. The action was not upon a wrong, but a contract. Talmadge agreed to use more than common diligence, and, if he did not do so, to be 217] \*liable to Maury; but he made no such agreement with the defendants, and *they* have no right to claim its performance of him. It is a tort on the part of the road company as to Talmadge—a failure to perform a contract as between Talmadge and Maury.

The last charge complained of by defendants, namely, that if Talmadge and the road company were equally in fault, the jury might apportion the damages, is, I think, against law; and it is, also, clearly against the rights of Talmadge. If he were entitled to a recovery, it was of the whole and not half the damages, and the defendants are not injured by that part of the charge.

READ, J. The record shows that Talmadge was the proprietor of a line of stages running upon the road of said company, and that, in consequence of the negligence of the company in not keeping their road in proper repair, one of his coaches was upset, to the great damage of a passenger in said coach. That the passenger, Matthew F. Maury, sued Talmadge for carelessly and negligently upsetting him, and obtained, in the circuit court of the United States, a verdict for \$2,300, which amount, together with \$130.51, the costs, Talmadge has paid. Talmadge, thereupon, brings this suit to recover back the sum so recovered against him, or, at least, a part of it, upon the ground that the wrongful act of the road company was the cause of the upsetting of his coach, and that the upsetting of the coach occasioned the injury to the passenger for which he was amerced in damages.



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The court below admitted the transcript of the recovery of Maury against Talmadge as an item of evidence to show the amount of damages which he should recover from the road company. The court below admitted the transcript as evidence in the case, and charged, that if they found the Zanesville and Maysville Road Company had not kept their road in good repair, but had been guilty of negligence, the jury would be authorized to apportion the damages which Maury had sustained \*by the [218 negligence of Talmadge, and should return a verdict for such amount, so found and apportioned, against the road company.

The jury, under this charge, returned a verdict against the road company for \$2,300, and for \$130.51 costs.

The road company prosecuted a writ of error, and the judgment below, for the amount of this verdict, was reversed in the Supreme Court. To reverse this latter judgment this writ of error is prosecuted.

The whole question is simply this: whether among wrong-doers, where damages have been recovered against one, an apportionment may be had among the several wrong-doers, and each be compelled to contribute?

A carrier of passengers, for hire, is bound to exercise the highest possible degree of care; and if, by the slightest negligence on his part, an injury is sustained by a passenger, he can recover the amount of damage sustained.

No damage, however, could be recovered against Talmadge unless there had been negligence, or some wrongful act on his part, which occasioned the injury. This negligence was proven in the circuit court, and there was evidence to the same effect on the trial of this case.

Talmadge now says to the road company, if you had not been negligent in not keeping your road in repair my coach would not have been overturned, and no damage would have been recovered against me. The road company may say, with equal truth, to Talmadge, unless your coach had been negligently driven it would not have overturned. Both were mere wrong-doers. The passenger selected Talmadge, with whom he had contracted for his safe transportation, and recovered against him.

Now, there is no principle of law upon which Talmadge can compel the road company to respond, in damages, for his wrong-

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ful act. The injury which Talmadge sustained, directly, by the negligent act of the road company, may be recovered.

219] \*This is the law. And if the court should permit carriers to recover the damages from the owners of bad roads, for injuries consequent upon the negligence of such carriers, there would be very little safety for passengers.

Judgment affirmed.

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JOHN BETTS v. JAMES WISE ET AL.

A woman, under the ordinance of 1787, was dowable of all lands of which her husband was seized during coverture.

THIS is a bill in chancery, from the county of Hamilton, for the foreclosure and sale of mortgaged premises.

The mortgage was given to secure the payment of two notes, one of which has been paid. To the second note was attached a condition, that it is not to become due, unless Mrs. Dayton's dower interest, in a certain square in Cincinnati, shall be released. The bill avers, that Mrs. Dayton had no dower in the premises, and, the condition being void, the note is due.

The land was originally purchased from the government by Symmes; and by him, on March 2, 1798, conveyed to Dayton. On April 29, 1803, Dayton conveyed to Williams, but Mrs. Dayton was not a party to the deed. Upon these facts, the question arises whether, before the statute of 1804, lands in Ohio, claimed by a husband, were liable to dower.

CHARLES FOX, for plaintiff:

I maintain that, by the terms of the ordinance, the widow was 220] only dowable of the lands descended from her husband. \*She is not dowable, under the ordinance, of lands which he held and deeded away during the coverture. The act of July 14, 1795 (1 Chase, 187), is taken from Massachusetts; and its only object is to provide a mode of assigning the dower.

The act of January 19, 1804 (1 Chase, 395), is the first act passed by the Ohio legislature on the subject of dower. By section 1 of this act it is provided that the widow shall be entitled, during

her life, to the use of one-third part of all the real property that her husband was seized of during coverture, unless she shall have joined with her husband in the conveyance.

If the conveyance from Dayton had been made after the passage of the act of 1804, I have no doubt Mrs. Dayton would have been entitled to dower; but, as the conveyance was made before that time, the act could not affect the property described in the deed. There being no dower-right in the way, there was none to release, and therefore the condition attached to the note is inoperative.

SAMUEL M. HART, for defendant:

The provision in the ordinance of 1787, upon the construction of which this question depends, is as follows: "That the estates of resident and non-resident proprietors, in said territory, dying intestate, shall descend," etc. [here follows the course of descents], "saving, in all cases, to the widow of the intestate, her third part of the real estate for life," etc.; "and this law, relative to descents and dower, shall remain in full force until altered by the legislature of the district." This clause in relation to dower, I claim, did not limit dower to cases where the husband died intestate, but merely recognized the right or estate of dower, as it existed at common law. The construction for which Mr. Fox contends would have enabled a husband to deprive his widow of dower in his lands, by making a will. The intention of the framers of this ordinance was, as I conceive, in this clause, to create the estate of dower, leaving to the common law to define of what that estate should consist. They determined that the widow's [221 right of dower should be saved; but the extent and manner of assigning it (until the act of 1795, adopted from Massachusetts), was to be determined by the common law. This notion of restricting dower to lands of which the husband died seized, could not have been very prevalent in 1787, for the common law, for centuries prior to 1787, as far back as Magna Charta, endowed the widow of all lands of which the husband was seized during coverture. Littleton, sec. 36; Park on Dower, 5. "It has continued unchanged," says Kent, 4 Kent's Com. 35, "in the English law to the present time, and with some modifications, it has been everywhere adopted as part of the municipal law of the United States." The modifications to which the chancellor here refers, I suppose, relate to the question whether the lands were wild. This is the

modern doctrine in Massachusetts, 15 Mass. 164; New Hampshire, 2 N. H. 56; and probably in one or two more states.

The first law adopted by the legislature of Ohio, that of 1804, embodied the idea of dower which prevailed in the territory at that time, and in every other country, where the common law obtained, so far as I have been able to ascertain.

LANE, C. J. The statute of 1804 (Chase's L. 395) expressly confers the estate of dower in all lands, and puts at rest all questions of this kind since its passage.

The only statute in force before, was one from Pennsylvania, adopted by the governor and judges, in 1795. Chase's L. 187. It neither creates nor defines rights, but merely points out the mode in which dower may be assigned.

The ordinance for the government of the Northwest territory provides a rule of descents for the estates of decedents, in the course of which it employs the following language: "Saving, in all cases, to the widow of the intestate, one-third of the real estate for life, and one-third of the personal estate; and this law, relative to descents and dower, shall remain in full force until altered by the legislature of the district." Swan's Stat. 42.

222] \*The plaintiff insists that before the statute of 1804, no right of dower subsisted, except such as was created by these words; and, as they are used in no other connection, than in respect to lands descended, it is inferred that no right of dower subsisted, except in the lands of which the intestate died seized.

If the estate of dower had no existence, except by virtue of the ordinance, it would be difficult to escape this conclusion. But there are certain institutions and rights which seem to have their foundation in the very constitution of the human race. No nation has been found so rude or uncivilized as not to have provided for itself rules which regulate the relation of marriage, those between parent and child, and the succession of decedents' estates. And men could not subsist, either in society or in the family, unless these matters, at least, are controlled by some rule which possesses the force of law.

In all the nations of the Teutonic stock, some right of dower has been found to exist from the earliest antiquity. This right has received various modifications at different times and in different countries; but before the concessions of the great charter, it as-

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sumed in England the modern form, by which it attached to all lands of which the husband had seizin during coverture. This continues to be the law of England, and is the law in most states of the Union.

Such is the common law of dower; an institution existing wherever the common law obtained; a rule which each people has the power to change, but a conception which none could shake off without substituting some other provision in its stead. It was to a people, under the dominion of this idea, that the ordinance was addressed, and, far from assuming to prescribe a different rule, or conferring a new right, it does no more than recognize an existing institution, and takes care that it receive no prejudice by the operation of the law of descents. We can regard it as no less than an authentic acknowledgment of the estate in dower at common law, to which law we must recur to learn the signification of the term, and the extent of the dowress' interest.

\*Influenced by these views, we are readily lead to embrace [223 the opinion that, during all periods since the organization of government in the territory, a wife was dowable of all lands within it, of which the husband was seized at any time during coverture. It follows, then, that, in this case, the condition has not occurred by which the note was to become due; and this bill, to obtain its payment by a sale of the tenements mortgaged, is dismissed, with costs. Bill dismissed.

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DANIEL McNAUGHTEN ET AL. v. HARPER PARTRIDGE, REUBEN PARTRIDGE, ET AL.

One member of a firm can not bind his copartner by a bond under seal.

Where a bond is executed by one member of a firm, all the members intending the instrument should bind them, the obligee has no remedy against the firm at law; but on the ground of mistake, may charge them in equity.

If the obligee, after discovery of the mistake, pursues the individual maker of the bond, it is a ratification of the instrument, and relief against the copartners will not be afforded in equity.

SEMPLE, a mistake of law may be corrected in equity.

THIS is a bill in chancery, from the county of Stark.

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The bill states that, in the years 1836 and 1837, the complainants, with one Gregory Powers, since deceased, were merchants in business, under the firm name and description of McNaughten, Powers & Co., and, during their continuance in business, sold and delivered large quantities of merchandise to the respondents, who were likewise merchants in company, under the name and firm of H. & R. Partridge & Co., which said merchandise was charged in account to the respondents, and used by them in their copartnership business.

224] \*That on September 25, 1837, there was a settlement of all accounts and dealings between the firms of the complainants and respondents, and there was found due to complainants \$411.92, for which sum a bond, or judgment note, was executed, and made payable on the 1st day of November, then next ensuing, and by which S. L. Hand, or any attorney, etc., was authorized to enter an amicable suit on said bond, and to suffer judgment thereon by confession, default, or otherwise, in any court of record, for the amount due thereon; which bond, or judgment note, was signed H. & R. Partridge, [L. s.] by Wm. W. Hale. [L. s.]

The bill further states that, at the time of the execution of the bond, it was not their intention to release or discharge any of the individual members of the firm of H. & R. Partridge & Co. from the amount of said bond, nor had they, nor either of them, any expectation or wish to be released or discharged therefrom.

Both complainants and respondents supposed that one member of a firm could bind the firm in any contract or bond in the name and for the benefit of the firm, *whether the same was under seal or not*; and the complainants were not aware of their mistake until they applied to their attorney for the purpose of having the bond collected, and, to their surprise, were then informed it was so made as to bind the individual party only, who signed and sealed it, and who was then insolvent.

The complainants further represent that, at the February term of the court of common pleas of Portage county, in 1838, they caused a judgment to be entered on said bond, in favor of complainants, Daniel McNaughten, Gregory Powers, Titus Chapman, and another, against William W. Hale alone, for the sum of \$411.92 debt, and \$12.35 damages, and \$8.11 costs of suit, and that said judgment remains unsatisfied and unreversed; that an execution was afterward issued on the judgment, and returned,

no goods, chattels, lands, \*or tenements found whereon to [225 levy. The bill further states that said Hale has no property subject to execution, but is totally insolvent, and has gone to parts unknown; that the complainants have no remedy against the other members of the firm of H. & R. Partridge, except in a court of equity, and pray that the said H. & R. Partridge may be decreed to pay to complainants the amount of their judgment, with costs and interest.

To this bill the respondents demurred.

ALVAH HAND, in support of demurrer:

It seems to be a well-established rule of law, that the giving of a bond satisfies and extinguishes a simple contract debt. 1 Bay's S. C. 495; 1 Hall, 292.

The defendants, H. & R. Partridge, claim that the taking of the bond, by the complainants, satisfied the debt so far as they were concerned, and that the complainants have no further remedy, either at law, or in equity, except as against Hale, the maker of the bond.

The complainants, if they recover at all, in this case, must succeed on the ground of mistake; but it can not be for a mistake of facts, as no such is charged in their bill; besides, they had as good an opportunity to be acquainted with all the facts of their dealings as the defendants had.

They can not recover on the ground of a mistake in law, as every man is presumed to know all the law that relates to his contracts, as well as to his civil duties.

It is a well-known maxim that *ignorantia legis neminem excusat*, and one which the student learns when he first enters upon the study of municipal law; 4 Black. Com. 23; Archbold's Ed; Plowd. 343; and this rule was early adopted into English jurisprudence from the civil law, and is equally respected by courts of equity, as by courts of law.

But suppose that ignorance of the law was an excuse for a man's mistakes, these defendants claim that the complainants have ratified the arrangement by subsequently entering judgment \*on [226 the bond against Hale, and ought to be estopped from pursuing them, either at law or in equity.

The complainants once had a legal right of action against H. & R. Partridge, and W. W. Hale, but, by a mistake of law, they have lost it, as against H. & R. Partridge, but it still exists against Hale. They have tried their remedy at law against him, but with-

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out effect. They now ask this court to restore them to the right which they had lost by their own act.

H. & R. Partridge would be holden on this bond if the complainants could show that they had adopted it either before, at the time, or after it was executed. The court, however, can not presume they have adopted it without proof, and the complainants do not claim such in their bill to be the fact. If adopted by the Partridges, the complainants' remedy would have been at law, and not in equity.

S. L. HAND, for complainants:

The question presented for the decision of the court in this case is, whether a creditor of a partnership, who has taken for his debt a bond signed and sealed by one partner for and in the name of the firm, can, if such partner prove insolvent, enforce collection of the debt against the firm, in a court of equity.

This question was once presented to the Supreme Court of this state in the case of *James v. Bostwick, Wright*, 142, and decided in the affirmative. Upon that authority and the manifest equity of the case, this suit is predicated.

The question arose as follows: James sued Bostwick on a contract, signed "Richmond & Bostwick," and sealed; but Bostwick having, in fact, executed the contract, the action was brought against him alone. In the course of the trial Bostwick called Richmond, his copartner, as a witness, and executed to him a release; but he was still objected to by the counsel for the plaintiff. 227] \* "By the court. This contract is a partnership contract in equity, though, at law, so executed as to subject one of the partners only upon the covenant, as but one sealed it. There can be little doubt but that, if a recovery is had, and the defendant prove insolvent, the witness might be subjected, in equity, to the debt. He is called, then, in favor of his own interest, and the release of his copartner can not affect his liability to the other party to the covenant. He must be rejected."

It is insisted, on the part of the complainants, that their property has been appropriated to the use of the firm, and has increased the partnership effects to the amount of their claim, and that all have had a benefit from the property sold; that the obligation to pay exists independently of any instrument by which the debt may have been secured, unless it was clearly the inten-



tion to release the firm from all further liability; but, from the manner of the filling up and executing of this bond, it is clear that such was not the intention.

From a close examination of the equity of the case, I have been unable to discover any good reason why the mere affixing of a seal to a contract, by an individual partner, when transacting the business of the firm, should, in equity, change the nature of that contract, and that, too, contrary to the intention and understanding of the contracting parties. It is contended that one partner can not bind the firm by contract under seal. This may be the law, but equity would seem to suggest a different rule. The right of each individual partner to bind the firm should be co-extensive with the business of the firm; and as partnerships are founded in mutual confidence, that confidence should not be limited to any particular manner of transacting the partnership business; neither should these defendants complain if complainants have placed the same unlimited confidence in their integrity that they have reposed in the integrity of each other.

The right of the individual partner to settle the account is not denied, nor is it contended that there was not due from the firm, to complainants, the amount mentioned in the bond. \*The [228 sole defense is, that a seal was affixed to the bond; and, therefore, they are not, in equity, bound to pay a debt by them admitted to be justly due from the firm to the complainants. A defense of this kind might, and probably would, prevail in a court of law; but that a court of justice, acting upon the principles of equity, would refuse relief to a party, under circumstances so trifling, is hardly to be conceived.

That this bond was taken by complainants, through mistake or ignorance of the law, there can be no doubt; and that the partner who executed it must have been equally mistaken or ignorant, is equally clear. In the case of *Edwards v. Morris*, 1 Ohio, 531, the court say, that "it is the peculiar province of chancery to relieve against fraud, mistake, or accident. But how far parol testimony can be admitted, to prove mistake in a written instrument, has been matter of much altercation and doubt. Mistakes in matter of fact, it seems, may be rectified. And the opinion of the court, in the case of *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. 174, goes far to establish the doctrine, that where the parties, through a mistake and ignorance of the law, execute a writing

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which does not carry into effect their contract and intention, that the true contract and intention may be enforced in chancery." See also *Young v. Miller*, 10 Ohio, 89.

It is said that if ignorance of the law was an excuse for a man's mistake, complainants have ratified the arrangement by subsequently entering judgment on the bond against Hale, and ought to be estopped from pursuing them, either at law or equity. Had this suit been instituted before pursuing Hale to insolvency, defendants might, with propriety, have contended that complainants had a legal remedy against him, and must first pursue that remedy before a court of equity could interpose; for, had that remedy been effectual, there would have been no necessity for the interposition of a court of equity.

The defendants seem to attach the utmost importance to the seal of this instrument, as though it was a matter of such magnitude that no court of justice could overlook it, or a barrier, beyond which a court of equity could not pass. It is said \*that seals were first introduced because men were unable to write their names, and were used instead of a signature. If such is the fact, the reason of using them having ceased, the seal itself should no longer be used.

A. HAND, in reply :

To sustain this bill, the complainants' solicitor relies upon the case of *James v. Bostwick, Wright*, 142, as an authority. That was an action of covenant, on a contract, to finish and put up a steam boiler, etc., etc., for which the plaintiff was to pay \$1,000. The contract between the parties was under seal, and signed "Richmond and Bostwick." On the trial, Bostwick released his copartner from all liability, and offered to use him as a witness (he not being party to the record). It was objected that he was still interested, and the court decided that he was not competent on account of his interest.

There is this difference between the case cited and the one now in hearing: *Partridge & Co.*, while in company, had contracted a running account, or debt, with the complainants; and, to settle it, Hale gave a bond, signed with the name of the firm by himself. Here was the adjustment and extinguishment of a simple contract debt, by the giving of an obligation under seal. It was intended by the complainants, at the time, that the bond should extinguish the account.

In the case in Wright, the property was delivered and put up under the agreement upon which the suit was brought, and there could, therefore, be no obligation of a higher nature. This question could not then arise in that suit. There the parties were exactly where they had originally placed themselves; here that relation has been changed.

In the case of James v. Bostwick, the court say: "This is a partnership contract in *equity*, though in *law* so executed as to subject one of the parties only upon the covenant, as but one sealed it." This language of the court seems not a little mysterious; and we should be at a loss to know what the court [230] meant by it, were we not helped out (if help it may be called) by the last clause of the sentence, "as but one sealed it." We suppose, by this, that Richmond had never acquiesced in the sealing of the contract by Bostwick in the partnership name. If he had so acquiesced, the plaintiff had not been able to prove that fact. It is a well-established principle of law that covenant could have been brought upon that contract against Richmond & Bostwick, if the plaintiff could make the necessary proof of knowledge and recognition of the mode of executing the contract. In 1 Hall, 292, Chief Justice Jones holds the following language: "If the co-partnership took a store upon lease, to transact their business, and both are named as lessees; but one of them only seals the counterpart, and the other agrees to it, and they occupy and enjoy the store conjointly under the lease, it is seen that covenant will lie against both for the rent." This is a full and perfect recognition of the doctrine that the seal of one binds the firm, when the partnership name is affixed, if the other partner recognize the transaction, and that covenant may be sustained on the contract against both. This decision was made in December, 1828, and nearly four years before the one in Wright. If the court do say, in the case just referred to, that covenant would not lie in such a case, they must have overlooked or entirely misapprehended the force of the authorities on this subject, or else Chief Justice Jones must have been mistaken.

If the court erred in saying that no action could be sustained at law against Richmond & Bostwick upon that contract (and we humbly conceive the court did so err), we shall also contend, and try to prove, that its conclusion in regard to the jurisdiction of a court of equity was equally erroneous and unfounded.

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If the plaintiff in that suit had a remedy, clear and unembarrassed, at law, as he doubtless had, equity could not step in and take jurisdiction of the subject matter of the contract. And 231] the court was equally without justification in saying that \*the contract was a contract in equity, when it was clearly a contract at law.

What we mean to say, then, is, that the case in Wright is not applicable here. If applicable, it is a violation of principle and contrary to adjudicated cases, and ought not to be sustained; and we trust the court in reviewing the same will come to the same conclusion in the matter that we have.

In regard to the mistake of law, we have to say that the case of *Edwards v. Morris*, 1 Ohio, 531, was a case of mistake of fact, and not of law. The parties had neglected to insert in their contract that part of their agreement whereby the defendant at law was to have the privilege of paying his note in the "notes of the Miami Exporting Company." It was a mere omission of a part of the agreement, and all other things being equal, the court could have afforded the proper relief. And why the court should have gone into the question of mistake in matter of law, we can not well imagine. The facts in the case did not necessarily lead to it. All that is there said is merely *arguendo*, and not entitled to the weight of an authority. We have not been able to examine the case of *Hunt v. Rousmanier*, 8 Wheat. 212, fully, but can say that if the case decides that a court of equity will relieve against mistakes of law, that it is an exception to the authorities generally.

Judge Story says, 1 Story's Eq. Com. 121, "It is a well-known maxim that 'ignorance of law will not furnish an excuse for any person, either for a breach or for an omission of duty;'" and he then refers to the authorities, one of which is the very case of *Hunt v. Rousmanier*, in 8 Wheat., the very case which the court cites in *Edwards v. Morris*, 1 Ohio, 531, to sustain the position that courts of equity will relieve against mistakes of law. Whether the court here will establish a new rule in this case upon the authority of *Edwards v. Morris*, and *Hunt v. Rousmanier*, we can never believe till we are furnished with the proof.

232] \*Wood, J. The rule in simple contracts appears to be settled, that to give a note or other security for a *prior* engagement is no discharge of the original agreement, unless the latter be paid

or performed, or, unless it was the understanding of the parties that the *latter* should extinguish the *former*. It has accordingly been held that the merchant who disposes of his wares and receives a note or bill at any number of days, if the note or bill is not paid at maturity, may set up the original consideration and recover in *indebitatus assumpsit*, on the common count for his goods. Numerous are the decisions in New York and Pennsylvania to this effect.

But when a *bond* or *sealed* instrument is taken for a simple contract debt, the former is of a higher nature than the latter, and the simple contract is merged, lost, and discharged by the bond. 1 Bay S. C. 495; 1 Hall, 292. The presumption is, that such was intended by the parties where a security of a higher nature is received, and that, too, whether it be the bond of the debtor or a third person. Such, then, being the situation of these parties, the complainants having the bond of Hale, one of the respondents, for the debt of all, it is clear the complainants have no remedy at law. It is equally clear they are remediless in equity, unless upon the ground averred in the bill, and admitted by the demurrer, that both the parties were under a *mistake* as to the legal effect of the execution of the bond, and its operation to discharge all *but the individual partner who sealed it*. Upon this last ground, if there was no other point to be considered, the court are unanimous in their opinion the complainants would be entitled to relief. This is one of the original grounds of equity jurisdiction. Though it is beyond the reach of a court of law, in ordinary cases in equity *mistake* may be molded into any shape to meet the intentions of the parties when it occurred. The counsel for respondents claim, however, that upon this ground the complainants' bill can not be sustained, because if a mistake has occurred, it is a *mistake of law*, and a court of equity will not attempt to correct mistakes in that which every man is presumed to know. Rules of policy are, sometimes, it \*is true, adhered to with great tenacity, and the common [233] good of a whole community requires, *oftentimes*, that they should not be relaxed. There are, however, other cases where the proof has been so clear as to overthrow this presumption, and where individual hardship was so great that they have, occasionally at least, been permitted to stand as exceptions to, if not to form general rules under which to grant relief. I do not know that I am authorized by a majority of my brethren to say a *mere mistake of*

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*law may be corrected*, but I am authorized to say that relief might be granted in the case at bar if it depended on the case of mistake made in the bill. The inquiry then is, what is the mistake as averred in the bill and admitted by the demurrer? Is it of *law or fact*? The bond given by Hale was precisely such as was agreed to be given. It was executed in the manner it was agreed to be executed. It contained every stipulation the parties supposed it contained, but they were mistaken in its *legal effect*. Its operation was to discharge H. & R. Partridge, and charge only Hale, who was insolvent, with the debt. This neither the complainants nor the respondents designed. Is it not then manifest that it was a *sheer mistake of law*, and may not such in certain cases afford ground for relief in equity?

By two of the judges of this court, relief was granted in a case by no means dissimilar, on the circuit in Cuyahoga county, at the last term. I cite from memory only, as I have with me no note of that case. Cushing had been negotiating with Clark, Hilliard, and Clark, for the purchase of two lots of ground. He concluded not to complete the contract. The parties had proceeded so far that two blank contracts had been filled up, but not signed by Cushing. In this situation Hall applied to purchase the two lots, and, to avoid trouble and expense, it was agreed Cushing should sign the contracts and assign them over to Hall, one of the vendors, saying that Cushing *would not be liable upon it* for the purchase money, and Cushing being advised to the same import by others.

Hall failed to make payment, and the vendors, threatening to 234] enforce the collection of Cushing, the contracts were \*decreed to be canceled as against him. In Muskingum county, at the last term, a bill was pending to enforce the collection of interest upon a mortgage, and a mistake of law was set up by way of defense; that it was understood between the parties, by the terms employed, that if the mortgager paid the principal punctually, the interest was not, in law, demandable, and the court refused a decree to the complainant, the principal having been punctually paid. The case of *Hunt's Adm'r v. Rousmanier*, 8 Wheat. 212 has been the subject of much comment. It is cited by both the parties in this case to show that equity *will and will not* relieve against a *mistake of law merely*. I have not had time to apply the investigation of it anew, but it is certain that the bill was brought to correct the instrument executed between

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the parties, because the legal effect was not such as the parties supposed it to be, from the terms employed by the draughtsman, though as to the actual language used *there was no mistake*. In this case Chief Justice Marshall delivered the opinion of the court. He observed, we are called upon to say, whether a mistake may be corrected, and that *mistake is clearly at law*. For the instrument is such as the parties supposed it was; the terms used are such, and there is no mistake of fact. He then reviews all the authorities, and comes to the conclusion that there is no one of them where the point was necessary to be decided, and where it had been expressly held that such mistake could not be corrected, and lays it down as a general rule that when, from the terms used in an instrument, it fails to carry out the *clear and manifest* intention of the parties, it will be reformed in equity to meet that intention and decreed accordingly. And yet this very case is cited by Judge Story, in his treatise upon equity, to show that a court of equity will not relieve for a breach or omission of duty arising from a mistake of law. 1 Story's Com. on Eq. 121.

But unfortunately for the complainants, there is another point in this case which destroys all right to the relief prayed, on the principle of mistake, whether such mistake be of fact or of law. It is averred by the complainants that when they \*ap- [235] plied to their attorney to collect the bond, they were surprised to learn that Hale only, who sealed it, was bound by it; that afterward they caused a judgment to be entered, and execution to be issued against Hale. These proceedings were *after the mistake had come to their knowledge*. The complainants, notwithstanding, persevered, and tried their remedy at law against Hale, without effect. By thus proceeding, after the mistake was known, they ratified and confirmed the arrangement, as it then stood; and it is, after this, too late for them to reform it. As well might the defendants have claimed not to be bound had they confirmed the act of Hale, in the execution of the bond, in which case, it is well settled the complainants would have had a remedy at law against all the partners. Bill dismissed, with costs.

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Lessee of Boyd v. Longworth.

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## THE LESSEE OF HENRY BOYD v. NICHOLAS LONGWORTH.

A sheriff's deed takes effect from the day of sale, so as to pass whatever interest the judgment debtor had in the lands sold at the time of the levy. The covenants in a deed which operate as estoppels, are those running with the land.

THIS is an action of ejectment from Hamilton county.

On the circuit there was a special verdict for the defendant, if on the questions of law made on the trial and reserved, he is, in the opinion of the court, entitled to it; but if not, then verdict to be entered for plaintiff. On September 10, 1816, an execution issued from the Hamilton common pleas, on a judgment rendered at the March term thereof, in the same year, in favor of Isaac Morgan and another, against William R. Goodwin and another, and was levied on the land in question, as the property of the said Goodwin. Under a *vendi*, issued thereon, the said premises were 236] sold on \*December 31, 1822, to the said Morgan, who immediately entered into the actual possession, and so continued until after the sale of the property, as his, by the sheriff, hereinafter mentioned. On April 16, 1823, William Butler, the then late coroner, who made the sale, executed and delivered to him a deed, which does not contain the requisite recitals of the judgment and execution, and was made without an order of court confirming said sale, and directing the execution thereof.

On the said April 16, 1823, an execution issued from the same court, on a judgment rendered at the December term thereof in 1820, against the said Morgan, and on April 29, 1823, was levied on the said premises as his property. Under a *vendi*, issued thereon, the same were sold, on November 19, 1824, to Israel Schooley. This sale was confirmed by the court, and a deed ordered, and afterward duly executed and delivered on March 9, 1825. Schooley, on September 30, 1826, conveyed the same to the defendant, by deed, duly executed.

At the August term, 1825, the said court, on motion, confirmed said sale of December 31, 1822, and ordered David Jackson, the then coroner (the sale having been made by the late coroner, and although there was then a sheriff in office), to execute and de-



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liver to the purchaser a deed, which was done on October 4, 1825, in due form of law.

Doubts having arisen as to the validity of this deed, as there was then a sheriff in office, the said court, at the February term, 1835, to wit, on the 2d of March, in said term, ordered the then sheriff to execute and deliver to the said purchaser, a deed for the said premises, which was done on March 3, 1835.

The lessor of the plaintiff claims title :

1. Under a deed from the heirs of the said Goodwin (who had departed this life after the first sale aforesaid), dated and acknowledged February 7, 1835; and,

2. Under a deed from the said Morgan, in consideration of forty dollars, with a covenant, "that he had not done anything \*whereby the title could be annulled." This deed bears [237 date on January 20, 1835, was acknowledged on February 2, 1835, and recorded on February 9, 1835, and, of course, was delivered before the last sheriff's deed of March 3, 1835.

The reporter was furnished with no argument for the plaintiff.

V. WORTHINGTON, with WRIGHT & HODGES, for defendant :

This case presents several important and intricate questions. Several that it is proper to consider, though the case may be settled and leave them untouched. I shall, therefore, endeavor to discuss them apart, successively, and in the order that may give the least labor to the court.

I. It will be perceived that the plaintiff claims title by the deed from the heirs of Goodwin. This source of title is overcome by the judicial sale to Morgan, and the subsequent proceedings ratifying and confirming it. True, the coroner's deed of April 16, 1823, may be considered bad on account of the defective recitals, Chase's L. 1237; and because there was no order of court confirming the sale and directing its execution, Chase's L. 1236; 1 Ohio, 278; but these are cured by the subsequent orders and deeds, and this branch of the title, as at present advised, may be considered as disposed of.

II. It will next be perceived that the plaintiff claims title through the judicial sale to Morgan, under a deed executed and delivered in February, 1835, before the sheriff's deed of March 3, 1835, under the order of March 2, 1835, without covenants of warranty, but with a covenant that nothing had been done to annul the title.

1. Under this aspect of the case, to sustain the plaintiff's title,

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it may be necessary to sustain the coroner's deed of October 4, 1825, and we ask if that can be done? There was then a sheriff **238]** in office. The sale had been made by the \*then late coroner, and the order of the court confirming the same, directed the then coroner to execute a deed to the purchaser. When a title is derived from a statute, independent of a judicial order, there is no question that the statute must be strictly pursued, or it does not pass. The power is not executed. 3 Ohio, 233; 4 Cranch, 412.

But when it has its origin in a judicial order of a competent tribunal, the title will vest, notwithstanding any irregularities that should have forbidden the order in the given case, and can, if at all, be overcome only by overcoming or reversing the order upon which it rests. 3 Ohio, 352; 10 Pet. 245. In such cases the court have the power, but exercise it upon an improper state of case. 3 Ohio, 560, 257, 272, 325; 4 Ohio, 130; 5 Ohio, 450, 500; 6 Ohio, 268; 7 Ohio, 12, 200; 9 Ohio, 19. And even then the title will not be overcome unless the party to the record is the purchaser. 8 Ohio, 127; 2 Chase's L. 1301; Swan's Stat. 479; 3 Ohio, 353.

But in no case can a judicial sale be sustained if the court had no power to make the order upon which the sale rests, or which is necessary in fact to sustain a deed under such sale. In all such cases the title is not affected, but remains. This was the great question in the Ludlow cases that have occupied no inconsiderable part of the attention of this court; 3 Ohio, 254, 554; 4 Ohio, 5; 5 Ohio, 494; as well as that of the federal courts. 2 Pet. 492.

In the present case, the power exercised by the court in ordering the coroner to execute the deed of October 4, 1825, must be derived from some statute, if it exist. The only law in force at the time, upon this subject, will be found in Chase's L. 1301, of the act regulating judgments and executions. It provides, "that if the term of service of the sheriff or other officer who hath made, or shall hereafter make sale of any lands and tenements, by virtue of an execution against the same, shall expire, etc., it shall be lawful for any succeeding sheriff or other officer, on receiving a certificate from the court from which execution issued, for the sale of **239]** said lands \*and tenements, signed by the clerk by order of said court, setting forth that sufficient proof hath been made to the said court that such sale was fairly and legally made, etc., to sign, seal, and deliver to the said purchaser or purchasers, or his legal representatives, a deed," etc. Section 20 of the present act,

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Swan's Stat. 478, contains precisely the same provisions. This law, as I understand it, requires the court to issue the order to the officer succeeding the one who had made the sale, and whose term had expired. The officer who had made the sale was the coroner acting in the place or stead of the sheriff. He was the acting sheriff. His successor in all the offices exercised or to be exercised in this matter was the sheriff, and the order should have gone to him. The law gives no power to the court to direct who shall make the deed, but gives the power to the officer succeeding the one in office who had made the sale as to that subject matter, when he has received the requisite certificate. The court's power is to grant the certificate to the succeeding officer, and his power under the law is then to execute the deed, which shall be good and valid in law and have the same effect as if the officer who had made the sale had executed the same.

The case of *Fowble v. Rayberg and Taylor*, 4 Ohio, 62, does not present this precise point, but the court there held that the deed should be executed by the sheriff in office at the time of the order. That case was on *certiorari*, and not in a collateral action. I, however, assume this to be a question of power, and claim that the court could only grant the certificate indicated by the statute, and that, under it, the sheriff in office should execute the deed, and not the coroner; that the sheriff, as to this matter, was the successor of the officer who made the sale, and to him the law gives the power to execute the deed.

If this be the correct construction of the statute, the deed of October 4, 1825, is inoperative, and of no avail to the plaintiff in tracing out his title. He is then forced to rely upon the deed of March 3, 1835, or go out of court.

\*2. We come, then, to consider whether he can rely upon [240 this deed. If he can, it must be upon one of two grounds: either his deed from Morgan, in February, 1835, vests the title by estoppel or rebutter; or the deed of March 3, 1835, relates back to some period anterior to the deed of Morgan, in February, 1835, so as to vest the legal paper title before the execution of that deed.

Is the deed from Morgan to the lessor of the plaintiff, in February, 1835, sufficient to pass an after-acquired title by Morgan, if the deed of March 3, 1835, is to be so considered, by way of estoppel? I am not aware that any covenant in a deed, except

that of warranty, operates by way of estoppel or rebutter, to vest the title, nor am I aware that any conveyance, except a feoffment, will pass a future estate, or one acquired after the alienation. Coke says (2 Thomas' Coke, 353), "This ancient manner of conveyance by feoffment and delivery of seizin, doth, for many respects, exceed all other conveyances. For, as hath been said, if the feoffor be out of possession, neither fine, recovery, indenture of bargain and sale enrolled, nor other conveyance, doth avoid an estate by wrong, and reduce clearly the estate of the feoffor and make a perfect tenant of the freehold, but only livery of seizin upon the land." And the annotator says (note B, 1): "And it not only passes the present estate of the feoffor, but bars him of all present and future right to the estate which is so conveyed." 2 Thomas' Coke, 457. Coke also says (2 Thomas' Coke, 245), "A warranty is a covenant real annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same; and, either upon voucher, or by judgment in a writ of *warrantia chartæ*, to yield other lands and tenements (which, in old books, is called *in excambio*), to the value of those that shall be evicted by a former title, or else may be used by way of *rebutter*." The annotator (2 Thomas' Coke, 245, note a), says: "Express warranties are contracts which have all the import and effect of the feudal contract between the lord and tenant. For, first, they rebut such warrantor and his heir from claiming any right in the land."

241] \*And Coke, commenting upon section 446 of Littleton (2 Thomas' Coke, 457), says: "For if there be a warranty annexed to the release, then the son shall be bound. For, albeit the release can not bar the right for the cause aforesaid, yet the warranty may *rebut*, and bar him and his heirs of a future right, which was not in him at the time; and the reason (which, in all cases, is to be sought out), wherefore a warranty, being a covenant real, should bar a future right, is for avoiding of circuity of action (which is not favored in law); as he that made the warranty should recover the land against the tertenant, and he, by force of the warranty, to have as much in value against the same person."

So also in 1 Shep. Touch. 182, it is said: "The fruit and effect of the warranty in a deed is, that it doth always conclude and bar the warrantor himself of the lands so warranted forever; so that

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all his present and future rights, that he hath or may have therein, are hereby extinct."

In 14 Johns. 194, the court say: "No title not then in *esse* would pass, unless there was a warranty in the deed; in which last case, it would operate as an *estoppel*, for avoiding circuity of action."

In 3 Pick. 60, the court say: "It has been the common understanding, that when one, supposing he has title, though in fact he has none, for a valuable consideration, conveys land by deed with warranty, and afterward purchases, that his new title shall accrue to the benefit of his grantee."

To the same point see also 9 Cranch, 43; 9 Wheat. 454; 11 Johns. 97; 2 Serg. & Rawle, 515; 3 Ohio, 120.

In 1 Swift's Dig. 621, it is said: "If one gives a deed of land he does not own, with warranty, and afterward purchases the same land, he would be estopped by his warranty, to say he did not own the land at the time of making the deed. A mortgagor is estopped to dispute the title of the mortgagee. A man shall not be permitted to defeat a deed under his hand, covenanting that the defendant shall enjoy the premises, and also for further assurance."

\*So in 1 Ld. Raym. 729, it was held: "That if A., not having [242] anything in certain land, demises it by indenture to B., and afterward A. purchases the land, this will be a good lease by *estoppel*." Every lease contains an implied covenant of warranty.

The case in 4 Bibb, 436, was under a warranty deed. So is the case in 1 Ohio, 402. In 5 Ohio, 193, the court say: "No man is permitted to deny an admission under his own seal. When this duty can be enforced under the forms of pleading, it is called an *estoppel*. But the instrument itself has never been held to bar him from setting up his after-acquired title, unless it contains an effective clause of warranty."

The case in 5 Ohio, 194, and that in 7 Ohio, 228, relate more properly to recitals in a deed. They, however, bear upon the same point. The case in 8 Ohio, 223, and that in 6 Ohio, 366, are to the same point. A deed to work an *estoppel* must be an operative warranty deed. So also is the case in 10 Ohio, 70.

In 7 Greenl. 96, it is said that a covenant that neither the grantor nor his heirs shall make any claim to the land conveyed, though not technically a warranty, runs with the land, amounts

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substantially to that covenant, and estops the grantor and all claiming under him.

In the view of these authorities, I do not feel authorized to say that any covenant in a deed, unless it be in substance and in effect a covenant warranting the title or future enjoyment of the property conveyed, can operate as an estoppel. The reason why the covenant of warranty operates as a rebutter, would seem to apply with equal force to the covenant for quiet enjoyment; but I am not advised that the latter covenant can, upon principle, be held to furnish anything but an indemnity, in case of actual disturbance by a paramount title.

In the present deed, there is none of the ordinary covenants, but simply the covenant that the grantor has done nothing whereby the title can be annulled. It is alone against his personal act, and 243] if it could, under any circumstances, operate as an estoppel, it must be in a case within the covenant, where he had done some act to defeat the title, and had asserted title in the face of that act. In no aspect could the covenant work an estoppel, unless the position assumed by the grantor would constitute a breach of the covenant. If the right he asserts will constitute a breach of his covenant, then, if at all, he may be estopped by his covenant to assert such a right. But, where the right asserted does not conflict with the covenant, it, of course, can not estop him. If, then, the title vested in Morgan by the deed of March 3, 1835, conduces to establish that he had, prior to the deed of February, to the lessor of the plaintiff, done, or suffered to be done, some act to impair his title, he should be estopped by that covenant to assert title under the deed of March 3, 1835, otherwise not. But such is not the case, and the covenant, of course, no estoppel.

If the covenant had been, that he had omitted no act necessary to perfect the legal title, and he subsequently should have asserted title, under a deed after acquired to perfect the title, for some omission covenanted against, then in this view, the covenant would have worked by estoppel, and vested the after-acquired title under the deed containing the covenant.

It seems, then, that the plaintiff can not claim title under the deed in question, by an estoppel, and it remains to inquire whether the deed of March 3, 1835, relates back so as to give him title under his deed in February previous. If this deed relates back so as to pass the title before its delivery, there must be some particu-

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lar point to which it goes for all purposes. Deeds executed under contracts are said to relate back to the dates of the contracts, so as to render valid intermediate sales by the vendees, and cut off statutory liens by law against the vendors. 3 Cowen, 75; 2 Johns. 510; 1 Johns. Cas. 81, 85; 2 Caine's Cas. 301; 3 Caine's Cas. 262; 1 Ohio, 257; 3 Ohio, 527; 7 Ohio, 225; 15 Johns. 309.

So a deed, by the sheriff, gives the purchaser title, by relation, to the time when the lien attached, so as to cut off all intermediate rights. 10 Ohio, 404; 3 Ohio, 530; 9 Ohio, 185; 15 Johns. [244 315; 3 Cowen, 75; 12 Johns. 140; 8 Cowen, 538.

So in 5 Ohio, 55, it is said, in substance, that the sheriff's deed vests under the statute, in the purchaser, all the title of the defendant, at, or after the time, when said lands became liable to satisfy said judgment. This is the language of the statute. Swan's Stat. 476; Chase's L. 1237, 1300.

So in 8 Ohio, 107, it was held, that a deed executed by a sheriff in office, and acknowledged by him after his term had expired, was carried back and cured by relation.

In the case of *McGuire v. Ely and others*, Wright, 520, the court held, that at a sheriff's sale, the purchaser's right vested on the day of sale, and the deed must relate back to give him title of that date. The law is imperative, as to the power of the court in ordering the deed in case the proceeding conform to its provisions or requisitions. They also say, that in the case of a reversal, after sale, under section 22 of the judgment and execution act, Swan's Stat. 479, the deed, nevertheless, must be made, and restitution will be made of the money for which the land sold, with interest from the day of sale.

In *Scribner's Lessee v. Lockwood*, 9 Ohio, 184, this court held a purchaser, at sheriff's sale, to be a *bona fide* purchaser from the time of the sale, and to be protected as such; and though they do not exactly go the doctrine of relation, yet they countenance it, and their decision can not be upheld upon any other principle; because the basis of the decision, that he is in truth an innocent purchaser, can not be upheld without a legal title to rest on, and the deed, when delivered, must, to that end, go back to the day of sale. 10 Pet. 177; 7 Pet. 252; 7 Johns. Ch. 76; *Talmadge v. Talmadge*, from Portage, decided in bank, last winter, and not yet reported.

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Without reference further, we suppose the purchaser's rights to the property commenced with the day of sale, and the deed relates, when executed, back to that period. He is entitled to rents 245] from that period, and bound for all assessments for \*public purposes, accruing thereon after that time; and from that period the property will be bound for his debts.

It is manifest there can be but one subsisting legal estate in fee simple, and that there can be but one available legal title thereto. It is also equally manifest that this legal available title must vest in some person, natural or artificial, and can not be *in nubibus*, nor in abeyance. It must rest somewhere. If we find it in one, and then in another, there must be some precise time of its transition. Some period when the property ceases to be legal estate of the one, and becomes that of the other. Some period when the legal title is in the one, and then in the other. In this instance there is a precise point at which the legal title passed from the judgment debtor to the purchaser on the execution. That point is at the delivery of the deed by the sheriff, or at the day of sale. If at the delivery of the deed, then the lands, after sale, and before the delivery of the deed, would be subject to levy, as the property of the judgment debtor, and the surplus of the sale would, if any, be applicable thereto; whereas, the money in the hands of the sheriff would not be, if the title passed, at this point in the judicial proceedings, by relation. 1 Ohio, 275. In case of reversal, the law, as we have seen, restores the purchase money with interest from the day of sale. If that be so, the emblements from that time belong to the purchaser. The pendency of the rents must be his, because it would be against reason and justice to permit the judgment debtor to enjoy the estate lawfully up to the delivery of the deed by the sheriff, and, upon reversal, to recover interest on the sale while he is in the enjoyment of the thing sold. If, in such a case, the interest on the sale money would be his from the day of sale, the rents or profits of the estate sold should not be, and must pass to the purchaser.

In this view of the case the deed to Morgan, of March 3, 1835, operated back, so as to vest him with the title at the time of the sale; if not, it did not vest till the day of the delivery. If it operated back to the day of sale, then it inures to give title 246] to the plaintiff, and we are thrown upon the \*defensive. If



it did not, then the plaintiff makes no title under it, and has established no claim to the judgment of the court.

3. We have said that if the deed of March 3, 1835, relates back so as to pass the title on the day of sale, the plaintiff makes a case for relief unless we can show a better title; and this brings us to our third position, which is, that if the deed of March 3, 1835, or that of October 4, 1825, immaterial which, relate back to the day of sale, then the deed of March 9, 1825, under which we claim, divested Morgan of all title, and he had no estate to convey, by the deed, to the lessor of the plaintiff, in February, 1835. The deed executed by the sheriff, or by the party through the sheriff, has the same force as if executed by himself. 9 Ohio, 186; 15 Wend. 596. Morgan is the common source of title to both parties, and it is not competent for either party to deny his right. 5 Ohio, 107. Indeed they can not, because their right depend upon it. If, then, both parties are precluded from denying Morgan's title, and the sheriff's deed, under which we claim, has the same operation it would have if executed by Morgan himself, the whole matter is settled by the priority of our deed over that of the lessor of the plaintiff. If, then, the deed of March 3, 1835, operates to pass the title as of the day of sale, it inures to confirm our title, and we are entitled to judgment, because we have the senior, and therefore better title.

4. Here, probably, it might be sufficient for us to rest. But there is another view of this case, to which we will now direct the attention of the court. It will be perceived that when the levy was made, under which we claim title, Morgan was in possession under his purchase at sheriff's sale, with a deed in confirmation thereof, though defective, for the reasons above assigned, and that he so continued in possession until after the sale to Schooley, on November 19, 1824. We claim that this possession alone constituted an interest in Morgan, which was subject to levy and sale; and when the sheriff's deed emanated, in 1835, or the coroner's, in 1825, it inured, also, to the purchaser at sheriff's sale. Morgan, against the purchaser, could not assert title; he could not [247 set up title in another, nor could any one, claiming title under him. 10 Ohio, 70, 403; 2 Ib. 224; 5 Ib. 55; 7 Ib. 228; 8 Ib. 23; 4 Cow. 601; 18 Johns. 94; 15 Wend. 593; Wright, 117.

We grant that a mere equity in lands can not be sold on an execution at law; but if it be connected with the possession, as to

*Lessee of Boyd v. Longworth.*

all the world, except the holder of the paper legal title, the equity is merged or drowned by the legal title growing out of the possession, and, in legal contemplation, has no existence. Courts of law look alone to the legal right. Possession is evidence of legal title. It is, in fact, a legal title. 7 Johns. 206; 18 Johns. 94; 1 Ohio, 314, 257, 281; 2 Ohio, 244; 10 Ohio, 70, 403. It is transmitted by descent. 1 Marsh. 4, 62; 2 Marsh. 620; Wright, 216; 5 Ohio, 198; 3 Cond. Pet. 216, 570; 3 Wash. C. C. 475; 4 Des. 562; and may pass by grant or will. It is true that it is the lowest grade of legal title, but it is impregnable to the holder, except against the paper title, and in the run of time will drown it. Possession, under a contract executed, is a defense against the vendor in ejectment. 14 Wend. 227; 9 Ohio, 249. Why? Because the possessor has the better legal title. He is no trespasser. He is in lawfully, and must be in default before he can be dispossessed. He never can be evicted, unless he is a wrong-doer in legal contemplation. So, a decree against the holder of the legal paper title, barred by possession, is inoperative for the same reason. 10 Ohio, 69; 5 Ohio, 194. Possession gives title, and it becomes so strong by time and age, that nothing can overcome it. So, also, an adversary possessory title that bars a legal paper title, bars all equities connected with, and springing out of, the legal paper title that is overcome by it. 10 Ohio, 104, 26; 9 Pet. 413; 2 Merv. 356; 2 Sch. & Lef. 628, 630, 636; 3 Serg. & Rawle, 310; 3 Johns. Ch. 216, 217; 2 Cond. Eng. Ch. 188; 7 Johns. Ch. 126. This shows the power and strength of a mere possessory right [248] from its very inception. \*It is strong in fact and in law. But one right can overcome it. All others fall before it.

I have said that a court of law looks alone to the legal rights of the parties, and can take no notice of matters in equity; when it finds a party in possession of land, it holds him to be there by right. If he be there under a contract executed, he has the legal title against all the world, except the vendor; who can not evict him, nor transfer the legal title to another who can, because his possession is notice to the world that he is in lawfully. 5 Johns. Ch. 29; 4 Johns. Ch. 47; 3 Paige, 421; 3 Pick. 149; 6 Paige, 387.

His equitable title under the contract has become united to his legal possessory title, and except for the single purpose, if the contract be executory, of securing the vendor's lien, the equitable title has become merged in the legal title.

Whenever a greater and a less estate unite in the same person, the latter merges or sinks into the former; and whenever an equitable and legal title meet, immaterial what may be the grade of the latter, in one person, in the same right, the former merges. It is true, in both cases, that equity prevents the merger, and preserves the estates distinct, for special purposes; but, otherwise, the merger takes place, and the distinction is lost. 3 Johns. Ch. 56; 6 Johns. Ch. 393, 417; 5 Johns. Ch. 35, 214; 2 Thomas' Coke, 556, 557, note K; 2 Atk. 67; 9 Ves. Jr. 509; 3 Ves. Jr. 126, 339.

No man can be a trustee for himself. Take the case in its strongest aspect, and the principle seems to me to be tested. A. sells to B. a tract of land, receives payment in full, gives him a title bond, and puts him in possession. The legal paper title is in A., but the possession is in B. For whose use does B. hold the land? He does not hold it for A., because he has parted with his right to the possession and to the usufruct, as well as emblements. B., then, if he holds to a use, must have a *cestui que trust* for whom the use exists. If there be no *cestui que trust*, or use, there is no use as independent of the possession, and B. holds in his own right. It then follows that there \*is no independ- [249] ent equity, and a transfer of the possessory right must pass with it all equities connected with, or growing out of it, or upon which it is based.

Take a very familiar case. A mortgagor is in possession, and condition broken. Against the mortgagee he has a mere equity, and against everybody else he has the legal title. While in possession, the land may be sold on execution as his, because of his possession; but if the mortgagee has possession, then it can not be sold, because he has a mere equity. If it be sold while he is in possession, and the mortgage debt paid, the title of the purchaser is perfect. If the mortgagee buy the land, the mortgage merges, and the legal title prevails. If the land be sold on execution afterward, as the property of the mortgagee, he can not set up the mortgage. 6 Johns. Ch. 417. Now upon what basis does all this rest? It is upon the merger of the equitable into the legal title when they unite in the same person. No man can be a trustee for himself, nor can he be a creditor or debtor to himself. Whenever therefore, an equitable title unites in him with a legal title, so far as he is concerned, and so far as the whole world is concerned, except he who is interested in preserving the estates distinct, the former is

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gone, and he is held and treated as the legal owner of the estate. The law considers him in his best position, and as holding the estate in the manner and under the title conducing to his highest interest. The law always places a man "with his right foot foremost."

In 10 Ohio, 404, this court seem to consider this "as a question of the gravest character, and incumbered with great difficulties." It may, therefore, be excusable in me to prosecute the inquiry somewhat further. The difficulty in the case seems to be, to determine in what way the purchaser under the execution is to be substituted to the rights of the vendee under the contract. He is substituted, I think, by the operation of the law working necessarily upon the case, as it does in all cases when it acts coercively. Suppose the vendee, after his purchase by deed, conveys the land without any reference to the contract, then it is clear, I apprehend, the purchaser <sup>250</sup> is substituted to his rights, and can compel a deed to him from the vendor, and the vendor may convey to him in affirmance of the contract without danger to or from the vendee. If, in such a state of case, the vendee should take a deed from the vendor, after his sale and conveyance, he would be estopped by his deed. He would not be permitted to say that he had no title, and in accordance with one of the positions above assumed, his deed would relate back to the date of his contract, so as to protect the intermediate purchaser.

Such, then, would be the result where the vendee, in or out of possession, sells. We have seen that a judicial sale is as operative as a voluntary sale by the party. 15 Wend. 596; 9 Ohio, 186. But a judicial sale can only take place where the vendee is in possession. It passes to the purchaser of the property sold (8 Ohio, 24), to hold at law as the vendee or judgment debtor held it. 5 Ohio, 55; 9 Ohio, 186. That is the operation of a voluntary deed, and if a deed under a judicial sale is to have the like operation with a voluntary deed, the purchaser under the one should in all respects occupy as good a position in the law as the purchaser under the other, and should in the like manner receive the same protection. If, then, the vendee would be estopped by his deed, he must be by the judicial deed. Why? Because the deeds in both cases pass the property and his legal right to the property, and that drowns and swallows up all his equities thereto. The possession gave a legal title. The acquisition of the legal paper title goes to confirm

the possession, and not to give a new right. It is, from the beginning, one and the same title, one and the same right. It is not distinct and independent of the right out of which the possession grew, and upon which it had fastened.

In the present case, Morgan's right grew out of his purchase on December 31, 1822. His possession is under that purchase, and the deed is to confirm his purchase, and gives him no new right. After the sale he paid the purchase money and took possession, and had (the proceedings all being regular) an undeniable right to a deed. Wright, 520. \*The deed, when received, inures to [251] establish and confirm the possession already taken. He is in under one and the same right. There is no unity of distinct estates or rights, no merger. The possession and deed hang upon the sale, and are fed by it, and they all constitute but one title, operating upon the same estate. If he had sold and conveyed before he received his deed, the deed when made inures to protect the title of his vendee. If he sell and convey by the sheriff or other judicial officer, the same result must follow.

We therefore claim, that if Morgan had conveyed this land before he received his deed, the purchaser could have received his deed from the sheriff, and, on a proper case, it would have been ordered to have been executed and delivered to him. 7 Ohio, 204. We also claim that the sheriff's deed, made to him after his sale and conveyance, would inure to the benefit of his vendee, and he would be estopped by his deed. We also claim that, in such a case, the same consequences would attach to a judicial sale and conveyance. After Schooley received his deed, he could have obtained the sheriff's deed, as the assignee of Morgan, by operation of law; or, if the deed was made to Morgan, as it was, it inured to his benefit, in confirmation of the possession previously taken by Morgan, and upon precisely the same ground that it would have inured, had he been the voluntary vendee from Morgan.

We therefore insist, in any aspect in which this case may be considered, the defendant's possession should be protected, and ask, in his behalf, a judgment.

BIRCHARD, J. Several questions are presented, which render this case intricate, and the decision somewhat difficult, if they are allowed to be so mixed up as to prevent each one from receiving a separate consideration. In examining them severally, we have

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found little difficulty in arriving at conclusions satisfactory to our own minds, aided, as we have been, by the careful, orderly, and thorough preparation of the case by counsel.

252] \*The plaintiff's first claim of title is under the deed from the heirs of Goodwin. These heirs took, by descent, from Goodwin whatever interest they had to convey. Their estate was no greater than that of their ancestor. Goodwin's interest in the lot was levied upon and sold in 1822; and this sale, which was subsequently confirmed, left in him no interest whatever, from and after the day of sale. When the sheriff's deed was finally executed and delivered, it, by relation, took effect as of the day of sale, and passed to the purchaser all the interest he then had.

Subsequently to that sale, he acquired no new interest in the land, and therefore dying seized and possessed of no right or title to the land, his heirs inherited nothing from him, and their deed to the plaintiff passed nothing, and may be treated as out of the way.

Whether the deed from Morgan vested in the plaintiff's lessor any title or not, is the next question in the order of inquiry. Morgan's right grew out of the coroner's sale to him, which was made on December 31, 1822, and his possession, which was under that sale. The deed which was subsequently executed, under the order of the court confirming the coroner's proceedings, gave him no new right. It merely confirmed the right acquired at the sale. If he had sold and conveyed, before the sheriff's deed was finally executed, the deed would have inured, when executed and delivered, to protect the title of his vendee; for the sheriff's deed would relate back to the sale on execution, and operate as a conveyance to him from that time.

With this view of the title deeds offered in evidence by the plaintiff's lessor, let us next consider the effect produced by the evidence given by the defendant. I lay out of view, as evidence of title, the coroner's deed, executed on April 16, A. D. 1823, because it does not contain the requisite recitals, and was executed without a confirmation of the sale by the court; also, the deed of the coroner, executed October 4, A. D. 1825, because there was then in office a sheriff, who was the proper successor of the coroner who made the \*sale, for the purpose of executing the deed. Schooley, under whom defendant claims, was a purchaser at a sheriff's sale, on execution against Morgan, who was then in

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possession of the lot, and who was a purchaser at the sale upon execution against Goodwin. He then owned all the right which he ever had to the premises. The sheriff's deed vested all the title which Morgan had, at the time of sale, in Schooley. This is the effect produced by the statute, and if we are right in holding that a sheriff's deed relates back to the sheriff's sale, and is operative from that time as a conveyance, concerning which we have no doubt, it follows that the estate of Morgan, in this land, was divested by that sale, and that the defendant is entitled to judgment.

But it is said that the deed of Morgan, of February, 1835, being prior to the sheriff's deed of March, in the same year, and containing a covenant "that he had done nothing whereby the title could be annulled," vests a title in the plaintiff's lessor, by way of *estoppel* or *rebutter*. To give this effect, it must be assumed that the setting up of title by the defendant, as derived from the sheriff's sale to Schooley, is an act done by Morgan, in the face of his covenant. It could not be pretended that the covenant would work an estoppel, unless the position assumed by the defendant is to be regarded as the act of Morgan, the grantor, and is such as to constitute a breach of his covenant.

The right asserted by the defendant, however, does not conflict with Morgan's covenant. It does not establish the fact that he had done anything *whereby his title could be annulled*. It simply proves that he had omitted an act which was necessary to perfect his title, and this makes no case of estoppel, for estoppel is a matter of *strict law*.

An *express warranty* is the *only contract* which has the effect to estop the warrantor, and those claiming under him, from maintaining title under a subsequent purchase. The *covenant must be one running with the land*.

Judgment for defendant.

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Hoy v. Hites—Ingraham v. Hart.

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\*JACOB HOY v. GEORGE HITES.

There can be no appeal to the Supreme Court, from a judgment of the court of common pleas, on a petition, under the statute, for partition.

THIS is a motion from Holmes county to dismiss an appeal to the Supreme Court, from a judgment of the court of common pleas, on a petition for partition, under the statute.

HOAGLAND and TANNEYHILL, for plaintiff.

COX and HOLLAND, for defendant.

READ, J. This case was reserved from Holmes county, on a motion to dismiss the appeal, upon suggestion that there was a difference of opinion among the profession, as to the right of appeal, when proceedings for partition were had under the statute.

When proceedings are had for partition, under the statute, no right of appeal to the Supreme Court exists.

When the partition is sought in chancery, by bill, the statute confers the right of appeal.

The reason is, in the first case, the statute confers no right of appeal; but the latter is an ordinary suit in chancery, which the statute authorizes to be appealed.

Both these positions are expressly sustained in the case of *Doane v. Fleming et al.*, Wright, 168. And the court say, in the matter of *Chapman's last will*, 6 Ohio, 148, the practice of removing causes, by appeal, for a second trial, is created only by statutory provision. Appeal dismissed.

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\*JOHN INGRAHAM v. THOMAS HART.

The existence of a law in a sister state, or foreign jurisdiction, is matter of fact, triable by a jury, and provable, if necessary, by witnesses.

Where a plea discloses a defense under a statute of Pennsylvania, the modifications that statute received in Pennsylvania, either by construction or otherwise, not merely depending upon the just interpretation of the words of the statute, are facts, to be disclosed by replication.



THIS is an action of debt, from the county of Monroe.

LANE, C. J. The declaration in this case contains four counts. The first and last are abandoned. The second and third are in debt, for rent of lands leased in Pennsylvania. The second counts upon a simple demise, the third on a demise by deed.

To these counts the defendant pleads, in bar, that the causes of action accrued in Pennsylvania, in which state the defendant was a resident; that, by the statutes of Pennsylvania, of 1713, ratified by the statute of 1777, it is enacted, among other things, that all actions of debt, for arrearages of rent, shall be sued within six years after the cause of action accrued, which act continues in full force. That the supposed causes of action did not accrue within six years, by means whereof the plaintiff ought to be barred. In drafting this plea, the pleader recites the statute, enumerates the exceptions, and avers that the plaintiff comes not within their protection.

To escape the bar of this statute, the plaintiff wishes to lay before the court the construction of that statute by the courts of Pennsylvania, by which the effect of it is limited to debt for rent by *parol* demise. No doubt the position is sound that the *law of limitation*, in Pennsylvania, is the law of this suit, and if that construction prevails there, it constitutes a good answer. In a former stage of this case, the plaintiff has attempted to rely upon a demurrer to the plea as the proper form to claim the benefit of it.

\*If the doctrine depended merely upon a just construction [256 of a statute, or of any document, this form of raising the question would be proper. But the question is not what is the *just and true* interpretation, but what is the *actual construction* of the document by the Pennsylvania tribunals? It is a matter of fact, *dehors* the plea. All the averments of the plea are true, and the reason why it does create no bar arises from the acts of the courts of that state. The point in issue is, what is the law in Pennsylvania? What is the law of another state? The existence of a law of another state is a question of fact triable by a jury; and provable, if necessary, by witnesses. The demurrer, therefore, which presents the just, but not the actual, construction of the Pennsylvania statute, is not, in the opinion of a majority of the court, calculated to disclose the defense; and it requires a replication to bring for-

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Ingraham v. Hart.

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ward the fact of the actual construction, and tender an issue to the jury.

Such was the opinion of the judges who held the Supreme Court in Monroe, in 1841, and the plaintiff's demurrer was overruled. He has since filed his replication, to which the defendant has demurred, as argumentative and double. For it avers:

1. That the statute has never been considered, adjudged, or construed, by the *persons exercising the powers of government* in Pennsylvania, to extend to debt, founded on a writing obligatory, either for rent or for any other consideration, but to debt upon parol demises only. It omits to specify what government or what officers.

2. Actions of debt, for rent, founded on writings obligatory, by the laws of Pennsylvania, have never been barred by the lapse of six years.

3. But such action may be commenced and prosecuted at any indefinite period of time.

4. Subject, only, to a presumption of payment after a lapse of twenty years unaccounted for.

5. And subject to no other presumption whatever.

257] \*Now, this is really covering too much ground. It is too loose and inartificial to require any other answer than a special demurrer.

The plaintiff has leave to amend.

BIRCHARD, J., dissenting. My reason for not assenting to the opinion of the court, is a belief that the demurrer to the replication, which is defective, reaches the plea to the second and third counts, and presents to the court, as *matter of law*, the question, whether this suit is barred by the Pennsylvania statute of limitations, as that statute is interpreted by the courts of Pennsylvania. And that the point should be determined by a reference to the decisions of their courts, without the intervention of a jury.

ARCHBOLD, for plaintiff.

D. PECK, for defendant.

**THE LESSEE OF ANDREW LE GRANGE v. ISABELLA WARD ET AL.**

The probate of a will, taken within the county, at another place than the county seat, by the associate judge, is competent evidence to establish the will.

The solemn adjudications of courts having jurisdiction over the subject matter, are not void, but valid until reversed.

THIS is a writ of error to the Supreme Court of Ashtabula county, to reverse a judgment in ejectment, at the August term, 1841.

On the trial, a bill of exceptions was taken to the opinion of the court, from which it appears the cause was submitted to the court for trial, without the intervention of a jury, and that \*the plaintiff, having proved that Benjamin Morse died [258 lawfully seized of the premises; that the lessor of the plaintiff was one of his heirs, and entitled to one-fifth of the land of which he died seized, rested his case.

The defendants then offered evidence of the will of Benjamin Morse, under which the defendants claimed title, and the probate thereof. The caption of the record of probate reads as follows: "Special Court, Harpersfield, Tuesday, March 25, 1813. Estate of Benjamin Morse, Esq., deceased. At a special court of common pleas for the county of Ashtabula, held at the house of Marian Morse, widow of the late Benj. Morse, Esq., deceased, and at the particular request of James Harper, James A. Harper, and the said Marian Morse, widow, as aforesaid, the widow being an executrix of the last will and testament of the said Benjamin, and unable to attend at the seat of justice in said county, the request was made and granted by the court. Present: the Honorable Aaron Wheeler, Solomon Griswold, and Ebenezer Hewins, Esqs., associate judges."

The evidence was objected to, but admitted by the court, and exception taken.

The only special error assigned is, the permitting said paper writing, purporting to be a record of certain proceedings had in the court of common pleas, to go in evidence; Harpersfield not being the seat of justice of Ashtabula county, at the time the associate judges convened there and received the will to probate.

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Lessee of Le Grange v. Ward et al.

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GIDDINGS & CHAFFEE, for plaintiff:

The jurisdiction of all probate and testamentary matters is vested in the court of common pleas. Constitution of Ohio, sec. 5, art. 3.

If the associate judges had the power to change the place of holding the court of common pleas; they would have equal power to change the time.

259] \*The law then authorizing a special session of the court of common pleas, for probate matters, was the same as the law now in force.

The law could give to the judges no power to take the probate of will, etc., except as a court of common pleas. It is therefore believed when the judges met at Harpersfield, they were no court of common pleas, and, of course, their acts were void.

WADE & RANNEY, for defendants:

If the court should have been held at the county seat by law, still having jurisdiction over the subject matter, their proceedings can not be impeached collaterally; for, however irregular, the solemn judgment of a competent and authorized tribunal can not be treated as a nullity; and it can only be reinvestigated by writ of error or *certiorari*. *Wier v. Zane*, 3 Ohio, 306; *Goodrich v. Jenkins*, Wright, 349; 6 Ohio, 43; *Buel v. Cross*, 4 Ohio, 327; *Lessee of Parker v. Miller*, 9 Ohio, 108; *Lessee of Mitchell v. Eyster*, 7 Ohio, 257.

The law in force at that time did not provide any place in the county where the courts should be held for any purpose. 2 Chase's L. 797.

The law under which this court was held, is found in section 5 of the supplementary act for proving wills, etc., passed February 8, 1812. 2 Chase's L. 770. It authorizes any three of the judges "to convene," for the purpose of granting letters of administration, etc., without any directions or limitations as to place. Now, they had jurisdiction throughout the county, and might, of course, convene at any place within their jurisdiction. If they went beyond its bounds, their acts would be *coram non judice*; but, while acting within it, they are not only valid, but perfectly regular. And this was the construction put on the law by the courts themselves at that time; for numerous instances of the kind occurred in this and the neighboring counties. Such a construction

as is contended \* for by the plaintiff in error would invali- [260  
date a great number of titles.

Wood, J. The seat of justice, as fixed by law, for Ashtabula county, when probate of the will was taken, was at Jefferson ; and the question raised by the plaintiff in error is, whether the court of common pleas, or the associate judges thereof, had power to take the probate of a will at any other place than the *county seat*. It is contended, by the plaintiff in error, they had not ; and, therefore, their proceedings in this case *are void*. If so, it follows that the court erred in admitting the probate in evidence, and the judgment must be reversed. Let us inquire, then, what the law was at the date of this probate.

The act of February 8, 1812 (2 Chase's L. 770), provides as follows : " That it shall, at all times hereafter, be lawful for the judges of the court of common pleas, or any three of them, when required, to convene for the purpose of granting letters of administration, taking probate of wills, or for transacting any other necessary business relative to the settlement of estates of deceased persons." This act was in force in 1813, when this probate was had, and it will be observed that it is *silent* as to the place *where* the court or associate judges shall assemble for the transaction of probate or testamentary business ; and, if there was any positive statute, then or now, requiring the court of common pleas to convene at the county seat, I have not been able to find it ; it has been overlooked after diligent inquiry.

The county seat may have been a *convenient* place ; but whether the *only* place *where* the court could legally have held its sessions, under all possible exigencies, is, at most, doubtful. The associate judges are limited in their jurisdiction only by the county lines, and while they keep within them, there can be no substantial objection to their taking probate of a will at any place, and it is a part of the history of that section of the country that there are several others like the case at bar.

But suppose we are wrong in this, and that the judges were required by law to do all official business at the county seat, \*it by no means follows that the acts of the court, or of the [261  
associate judges, are void.

If a court have jurisdiction over the subject matter, its solemn acts and adjudications, although erroneous, are not void. They

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State of Ohio v. Wells, Adm'r of Forsythe.

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are valid until reversed. *Weir v. Zanc*, 3 Ohio, 306. And even the proceedings of mere *judges de facto* have repeatedly been sustained both in England and the United States. We are of the opinion, there was nothing erroneous in receiving the record of the probate court in evidence, and that the judgment of the Supreme Court of Ashtabula county ought to be affirmed.

Judgment affirmed.

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THE STATE OF OHIO v. JAMES A. WELLS, ADM'R OF JAMES FORSYTHE.

The statute making certified copies of the files of the auditor of state evidence, authorizes their admission only where the originals would be competent.

The act regulating the sale of school lands does not authorize the final certificate of the county auditor to be used as evidence to charge the county treasurer; nor is a certified copy of an account, made out by the auditor of state from such certificates, competent evidence.

THIS is a motion for a new trial from Shelby county.

The action was brought upon the official bond of defendant's intestate, as treasurer of the county of Shelby, to recover money alleged to have been received by him on the sale of certain school lands. On the trial to the jury, the plaintiff offered in evidence a certified copy of an account current, made out in the office of the auditor of state, authenticated by the seal of office, and official signature of the auditor, and certified in the following form:

"I, John Broagh, auditor of state, do hereby certify the foregoing amounts have been carefully and correctly taken \*from the final certificates on file, in this office, and that the same have not been reported according to law, or paid into the state treasury."

To the admission of this as evidence, the defendant objected, but the objection was overruled, and the account was read to the jury. For an alleged error in admitting this evidence, a new trial is asked.

WILLIAM J. MARTIN, for the state.

J. S. UPDEGRAFF, for defendant,

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BIRCHARD, J. The first question in this case is upon the construction of section 14 of the act prescribing the general duties of the auditor, treasurer, and secretary of state. Swan's Stat. 121. It is in these words: "The auditor shall deliver to any person applying therefor, a certified copy of any survey, or other document in his office; and all such copies certified by the auditor, under his official seal, shall be received as legal evidence in all courts and places within this state."

The question is, does this section contemplate the creation of any new evidence, or make a new rule of evidence? Or, does a true interpretation of its terms require that it should be held merely to authorize the use of the copy provided for, in those cases only, in which the original, if in court, would be held competent? In our opinion, the latter was the true meaning of the legislature. If so, it follows that the certified copy in question was improperly read to the jury, unless the original would have been competent evidence to charge the defendant in this suit. It is only necessary to turn our attention to sections 11, 12, 13, and 16 of the statute, 3 Chase's L. 1556, 1557, to enable us to arrive at a correct determination of this matter. By section 11, it is provided that, on a sale of lands, the county auditor shall give a certificate to the purchaser, specifying the amount of payment to be made, and on what account; and that the purchaser shall make payment to the county treasurer, \*and take his receipt; which re- [263] ceipt shall be deposited with the county auditor, who shall preserve the same, charge the treasurer with the payment, and give the purchaser a receipt therefor. By section 12, the county auditor is required to keep a book of sales, and day-book and ledger for accounts, and forward quarterly, to the auditor of state, transcripts of the sales, and of the payments made to the county treasurer, which the auditor is to file in his office. Section 13 requires the county treasurer to keep books of account, in which all the moneys received by him are to be entered, and to forward quarterly transcripts thereof to the auditor of state. Section 16 provides that, on full payment being made, the county auditor shall give to the purchaser a final certificate, etc., upon presentation of which, to the auditor of state, the purchaser shall be entitled to a deed. From these four sections, it is not difficult to perceive what checks are provided by law for the protection of the public, or

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what evidence is proper to charge a county treasurer, making default of a portion of the school fund.

In the first place, he can receive no money without giving therefor a receipt, in his official capacity, under his sign manual. This receipt must be deposited as an official voucher, and filed in the office of the county auditor. In the next place, he must make and forward to the auditor of state correct quarterly transcripts of his own account of moneys received. These, also, must be verified by his signature.

If sued, the original receipts, or the quarterly transcripts, are, in the first instance, the only competent evidence wherewith to charge him. But as there is danger in permitting official files to be taken from the office of the auditor of state, the law has provided that a certified copy shall be legitimate evidence. The copy read to the jury was not such evidence, but was of a secondary character. It was not legal evidence. It was not even the copy of a copy of any paper or document emanating from the defendant's intestate; but a statement of accounts made up from final certificates, which were made without the treasurer's agency, and possibly without his \*knowledge, by the auditor of the county. I say probably without his knowledge, for it is at least supposable, that the auditor of the county might have issued a certificate by mistake, or on a forged receipt of payment, or willfully, he having himself received the money. Could it be tolerated, that a man's property, or reputation for official integrity should be put in jeopardy in a court of justice, by evidence so liable to error as this?

The fact that the treasurer's quarterly transcripts contained no reports of moneys paid on the lands in question, affords no sufficient reason for the admission of this evidence. For, if in fact, the county auditor, as in the case supposed, was imposed upon by a false certificate of payment, and the county treasurer was a correct and honest man, his transcript would not contain a report of this kind. It is, however, argued, that inasmuch as a deed is required to be issued, on the presentation of the county auditor's final certificate, the state may, under the views taken, lose the title to the land without receiving payment. If it were so, that would furnish no excuse for permitting the recovery from an innocent person.

But we see no difficulty in making the county auditor respon-



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sible for the damage occasioned by the issue of any final certificate without the proper voucher.

Supposing him to have received such voucher and performed his duty, there is as little difficulty in the way of maintaining this suit. The prosecuting attorney has only to summon him to bring into court the treasurer's receipts, and he will be furnished with full proof of the plaintiff's right to a recovery; or, if the receipts are lost, the auditor may then prove their loss, and give parol evidence of their contents. New trial granted.

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**\*WALTER ARMSTRONG v. ARNDT KATTENHORN AND MARTIN [265  
KATTENHORN.**

A parol contract for a lease between landlord and tenant in possession, under a prior lease, is within the statute of frauds; unless possession be held solely under, and in performance of, the parol contract, the terms of holding clearly indicating the possession to be under the subsequent parol lease.

THIS was a writ of error from the court of common pleas of Hamilton county.

On the trial below, a verdict was rendered in favor of the defendants, under the charge of the court, to which the plaintiff excepted.

The bill of exceptions shows that the defendants were in possession of certain premises as lessors.

That Armstrong purchased these premises of the owner.

That, while thus in possession, Armstrong made a verbal agreement with them that they should have and occupy said premises for one year, from February 6, 1840, at an annual rent of \$600, payable fifty dollars per month in advance.

That the defendants occupied and paid the rent up to June 6, 1840, when they abandoned the premises.

This suit was brought to recover rent due on the 6th of June and 6th of July upon said parol contract.

Possession of the premises was never delivered to the said defendants, under the said parol agreement on which suit was

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brought, but theirs was a continued possession of the premises on a contract with the original owner from whom the plaintiff bought.

Upon this state of facts, the court below charged the jury that, if the rent had been paid by the defendants while in the actual occupancy of the premises, and the plaintiff sought (merely) to recover upon the breach of the parol contract, concerning the renting of the premises, that it was within the statute of frauds, 266] unless the possession of the premises had \*been delivered in pursuance of the parol contract; and that if the possession was a mere continuance of possession, had under a former lease, such continued possession would not be such part performance of the parol contract made with the defendants, as would take the case without the statute of frauds.

That to take the case without the statute, upon the ground of part performance, there should have been an actual delivery of the possession, in pursuance of the parol contract; and if such had not been the case, the plaintiff could not recover for the breach of the parol contract.

To which opinion of the court counsel except, and assign it as error.

RIDDLE and ROLL, for the plaintiff:

The plaintiff in error contends that the contract between the parties was so far changed by the parol lease, on February 6, 1840, by the payment of the rent, agreeable to said contract, subsequently, from February 6, 1840, to 6th June, same year, monthly, in advance, and was so different from the original possession and tenancy, that such a possession, under such circumstances, took the case out of the statute of frauds.

The contract made on February 6, 1840, put an end to the old tenancy and possession, and by the defendants attorning to plaintiff, agreeable to the new contract, such a possession and compliance, under that contract, on the part of the defendants, would take the case out of the statute. In other words, it was such a part performance, on their part, that a court of equity would have decreed against the plaintiff a specific performance of the lease.

Judge Story says: "If the possession be delivered, and obtained solely under the contract, or, if in case of a tenancy, the nature of the holding be different from the original tenancy, as by the pay-

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mont of a higher rent, or by other unequivocal circumstances, referable solely and exclusively to the contract, \*then [267 the possession may take the case out of the statute." 2 Story, 68, 69.

Now, we say that the holding, by the Kattenhorns, under the parol contract, between them and plaintiff, was entirely different from their former tenancy; they paid a different rent, and attorned to a different landlord, and under a different contract, from what they were in possession under.

The defendants do not pretend to say that they held under the lease given by Barr. Had not the possession so far changed, by the contract aforesaid, between plaintiff and defendants, as to make it a new lease, we would not contend, for a moment, that the court below erred in the decision there made.

We wish to be understood that, by the defendants' entering into a new contract, paying rents differently, and attorning for same under said new contract, that it was so far a change of the original tenancy, and that there was such a partial performance of said new contract, as to take the case out of the statute.

Should the court be of a different opinion, then the judgment of the court below should be affirmed. If otherwise, it should be reversed.

WRIGHT, COFFIN & MINER, with JAMES RILEY, for defendants:

We do not see any error in the charge of the court. Courts have already gone too far in their efforts to make the statute of frauds of no effect. If wrong, it would be better to repeal it at once.

In the more recent decisions, judges have expressed regret that so many exceptions to the statute had been established, and expressed a determination not to make any new ones.

In *Lindsay v. Lynch*, 2 Sch. & Lef. 4, Redesdale, Lord Chancellor, says: "I am not disposed to carry the cases which have been determined on the statute of frauds any further than I am compelled by former decisions. That statute was made for the purpose of preventing perjuries and frauds; and nothing \*can [268 be more manifest, to any person who has been in the habit of practicing in courts of equity, than that the relaxation of that statute has been a ground of much perjury and much fraud. If the statute had been rigorously observed, the result would probably have been, that fewer instances of parol agreements would

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have occurred. Agreements would, from the necessity of the case, have been reduced to writing; whereas, it is manifest that the decisions on the subject have opened a new door to fraud; and that, under pretense of part execution, if possession is had in any way whatever, means are frequently found to put a court of equity in such a situation, that, without departing from its rules, it feels obliged to break through the statute."

But it is now supposed attornment, or payment of rent, is such a part performance as will take the case out of the statute. This does not appear to have been a point made on the trial below. If it was made, and the court charged upon it, it is certain there was no exception taken on account of such charge. How can this court, then, look beyond the record for such error, and presume it? If the point was made, the action of the court, in respect to it, must appear in the bill of exceptions, or it is beyond the reach of this court, sitting as a court of errors.

Waiving this objection, however, for the sake of argument, we have not found any case where it has been held that payment of rent, under a verbal agreement, not accompanied with a delivery of possession, is sufficient of itself to take the case out of the statute. In *Wells v. Stradling*, 3 Ves. 78, the bill stated that the plaintiff was lessee of a farm for seven years. The lease being to expire in 1794, the plaintiff, in June, 1793, desirous of making some expensive improvements upon the premises, applied for a new lease for fourteen years, which was agreed to be granted at an increased rent. Shortly after, the plaintiff, upon the faith of the agreement, began to make improvements, and laid out a large sum of money. Plaintiff continued in possession after the expiration of the former lease, and paid the increased rent, for 269] which the defendant gave him \*receipts. Prayer for specific performance of the agreement. The defendant plead the statute of frauds, with an averment that there was no agreement in writing.

Thurlow, Lord Chancellor. "Three grounds are stated: possession by the plaintiff, which he refers to the agreement; payment of an increased rent, which he also refers to the agreement; and the laying out of money upon the improvement of the farm.

"As to the first ground, the possession in the case of a tenant, who, of course, continues in possession, unless he has notice to

quit, the mere fact of his continuance in possession would not weigh. The delivery of possession, by a person having possession, to the person claiming under the agreement, is a strong and marked circumstance; but the mere holding over by the tenant would not, of itself, take the case out of the statute, or even call for an answer.

"As to the money laid out, if it was part of the contract that money should be laid out, and it was one of the considerations for granting the lease, it is very strong to take the case out of the statute. But the circumstance which I think distinguishes this case is the payment of the additional rent. Payment of additional rent, *per se*, is an equivocal circumstance, it is true. It may be that he should hold from year to year, the lease being expired. But the averment is that the landlord accepted the additional rent upon the ground of the agreement."

Whether the possession be an unequivocal act, amounting to part performance, must depend upon the transaction itself, whether it be so circumstanced that it can refer only to a contract of sale. If the connection of landlord and tenant had before existed, it would be a continued possession, and no evidence of a contract. *Savage v. Carroll*, 1 B. & Beatt. 282; *Morphett v. Jones*, 1 Swanst. 181.

A parol agreement will not be enforced upon the ground of part performance, as when the act is equivocal, and easily admits compensation; as by a tenant rebuilding a party wall. So a tenant's possession and cultivation of the premises would not sustain a parol agreement to purchase. *Frame v. Dawson*, 14 Ves. 387.

The acts done in part performance must be such as could be done with no other view than in part performance of the agreement. *Gunter v. Halsey*, Amb. 586; *Lacon v. Mertins*, 3 Atk. 4; 2 Story's Eq. 69.

Judge Story says: "Mere possession of the land contracted for, will not be deemed a part performance, if it be obtained wrongfully by the party, or if it be wholly independent of the contract. Thus, if the vendee enter into possession, not under the contract, but in violation of it, as a trespasser, the case is not taken out of the statute. So, if the vendee be a tenant in possession under the vendor; for his possession is properly referable to his tenancy, and not to the contract. But if possession be delivered, and ob-

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tained solely under the contract, or if, in case of a tenancy, the nature of the holding be different from the original tenancy, as by the payment of a higher rent, or by other unequivocal circumstances, referable solely and exclusively to the contract, then the possession may take the case out of the statute." 2 Story's Eq. 69.

The concluding remarks, above, are evidently grounded upon the case of *Wills v. Stradling*, 3 Ves. 378, before cited. But what is there in the case under consideration, referable solely and exclusively to the contract? Not the possession, for that is referable to a former agreement, with a prior owner of the premises; not the payment of rent, if that fact is to be considered, for that may be referred to the former agreement, or to the mere occupation or use.

In the case of *Frame v. Dawson*, 14 Ves. 381, the defendant became the owner of the premises during the plaintiff's tenancy under a former lease, and the plaintiff attorned to him; yet it does not appear that this fact was relied upon.

The case of *Jones v. Peterman*, 3 Serg. & Rawle, 543, is identical with the case made by plaintiff's bill of exceptions. Jeremiah Hornketh, the younger, was entitled to the land in dispute, as administrator of his deceased father, Jeremiah Hornketh, under 271] a lease to the latter, made by Wm. Hamilton, dated \*November 28, 1812, for the term of seven years. In 1813, Hornketh, the son, made a verbal agreement with one Jacob Perkins, to devise to him this land for the residue of said term. This verbal agreement was to have been reduced to writing, but was not. Perkins was in possession of the premises at the time of making the verbal agreement, and before, by virtue of some agreement with the son or the father, and continued in possession until he assigned to the defendants.

The plaintiff claimed under a written assignment of William Hamilton's lease, made by Hornketh, the son, dated July 22, 1814. Upon these facts the court held that possession, had before a parol agreement of lease for seven years, and continued afterward, is of too doubtful a nature to be considered as part performance, and to take the case out of the statute for the prevention of frauds and perjuries. Although not expressly stated, Perkins must have paid rent, for he had the premises several years after

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the verbal agreement. So the case is identical, in all respects, with the one under consideration.

We have examined a great number of authorities, but have not found a single one to sustain the claim of the plaintiff.

We therefore conclude that, even without reference to the authorities cited by us, this court, in the absence of express authority, will not create a new exception to the statute of frauds for the benefit of the present plaintiff.

READ, J. We are unable to perceive any error in the charge of the court below.

The foundation of the action was a parol lease, of a term which the statute of frauds and perjuries declares void. To escape its operation, reliance is had upon part performance.

Part performance, which avoids the statute, may be defined to be acts done in performance of the contract, which put the party performing in such a situation that the non-enforcement of the agreement, as to him, would be a fraud.

The situation of the parties must be so changed that the enforcement of the contract alone can furnish adequate relief.

\*Hence, the mere payment of the purchase money will [272] not avoid the statute, because its recovery back is regarded as full compensation. But delivery of possession, in performance of the contract, avoids its operation.

But if possession be relied upon, it must be clearly referable to the contract, and be delivered and held in performance of it.

Possession must give the contract life, and if they can possibly be separated, the parol agreement perishes under the operation of the statute.

Hence, if the possession can be referred to any other source than the parol contract, which it is claimed to support, even to the wrongful act of the party in possession, or to a different contract, the statute applies.

Thus, if a vendor sell to a vendee, in possession as tenant, the possession is referred to the original tenancy, and not the contract of sale. So with a tenant in possession, in case of a parol agreement for different terms of holding, if no acts are performed which clearly show that the possession is continued under the last agreement, it will be referred to the original tenancy, and such parol contract will be void.

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In the case now under consideration, the record shows no act that is not as clearly referable to the possession under the old tenancy, as the parol lease upon which recovery is sought.

If it be contended that rent was paid under the parol contract, it may be replied, from aught that appears in the record, that the same rent was due on the original tenancy, under which the defendants were in possession.

The possession of the defendants, then, is not shown, by unequivocal acts, to have been continued or held solely in performance of the parol contract, and must be referred to the prior lease.

Possession must accompany the contract, in performance of it, in all cases, to avoid the statute; and this is, in substance, the charge of the court below. The record says the possession was not delivered under the parol lease, but was continued under the prior tenancy.

273] \*True, Armstrong purchased the premises subject to the lease, and, after the purchase, rent was paid to him, but this, unexplained, must be deemed a simple act of attornment, and does not imply a holding upon different terms.

Rent was due upon either holding, and possession was consistent with the original tenancy. Judgment affirmed.

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**HENRY MIERS AND JONATHAN COULSON v. THE ZANESVILLE AND  
MAYSVILLE TURNPIKE COMPANY ET AL.**

A general demand against a judgment debtor to disclose his assets, that they may be subject to execution, is proper. No suit lies against the state to compel the payment of subscription to stock. Where there is a receiver of tolls, appointed under the statute of 1842, by a court of competent jurisdiction, it acquires authority to determine all questions touching the distribution and appropriation.

THIS is a bill in chancery from the county of Fairfield.

The state of the pleadings and the material facts appear in the opinion of the court.

The case was fully argued by HUNTER & GARRAGHTY, for complainants, and by H. STANBERRY, for defendants.



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LANE, C. J. The plaintiff shows he has recovered judgment against the turnpike company, and that they have no assets liable to be seized on execution at law; that there are back subscriptions yet due the company, both from individuals and from the State of Ohio; and that the company are levying tolls from persons traveling on the road, all which, he prays may be subjected to the satisfaction of this judgment. A supplemental bill charges that D. Talmadge is indebted to the \*company for tolls, which [274] they ask to be applied to their benefit.

The defendants demur to the several claims in the bill. To that part which seeks to subject unpaid subscriptions, it is claimed the demurrer lies, from the want of sufficient certainty in pleading. The bill asserts that a great number of individuals, whose names are unknown, but whom, when discovered, they ask may be made parties, are indebted for subscription of stock, and they pray the company may set forth their names in their answer. The defendants insist this general description makes a fishing bill, which they need not answer. We do not think the objection well taken. We regard it proper practice, when the liability of the defendant is fixed, and no assets at law are forthcoming, to compel *him* to disclose his means to pay the debt, especially where the nature of the resources are pointed out by the bill, and his answers, upon such a point, specifically required. 4 Johns. Ch. 620. If it were otherwise, equitable assets would frequently escape the most searching inquiries of creditors. So much of this demurrer as relates to the form of the bill is overruled, and the company is required to set forth the names of their debtors.

To so much of the bill as assumes to compel the state to pay arrearages of its subscription, it is plain that no answer need be made; it is enough to say the state is not, in fact, a party, and is not capable of being made a party defendant.

To this class of assets the demurrer is well taken.

To that part of the bill which pursues the right to collect toll, a plea is offered that another creditor has filed his bill in Muskingum against these defendants, that a receiver has been appointed, and the tolls already sequestered, and in the hands of a court of chancery, having jurisdiction over these assets.

Whenever a trust fund comes under the jurisdiction of a court of chancery, for management and distribution, the nature of the case renders it necessary that such tribunal should assert and

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maintain its plenary power over the whole subject, to the exclusion of every other forum. The most usual case in which it is exempted] 275] plified, is in the case of a creditor's bill to \*settle the estate of a decedent, which brings the whole settlement of the estate within the court where filed, and all proceedings elsewhere will be restrained by injunction. 4 Johns. Ch. 631, 640.

But the same necessity submits in every case of a holder of a trust fund, to sustain the exclusive jurisdiction, for the purpose of preventing a double liability of the holder of the trust fund, and to insure its due appropriation.

The statute authorizes a creditor to institute proceedings against turnpike companies to sequester their tolls. A single suit, lawfully instituted, gives jurisdiction to the court to sequester the whole tolls, although the road passes through, and the gates may be situated in different counties; for the company is suable in the county where its functions are exercised, and its franchises may be seized by the court to whose jurisdiction it is subjected. As the court in Muskingum had power to appoint a receiver to seize its tolls, the authority of that receiver extends throughout the state, wherever it may be necessary to exercise it, and the court who appointed him will protect him in the exercise of his power. If, then, the plaintiff in that suit, in Muskingum, has secured a priority, he has drawn within the jurisdiction of that court the whole administration of the fund, which that receiver may control, until he, and those who are permitted to become parties to his suit, have exhausted the assets, or attains the objects he has sought by his bill.

It is then necessary to look to the question of priority, and determine by what it is acquired. This bill was filed first; but the decree rendered, and the receiver first appointed in the other. We think that he whom the law first authorizes to *receive* the tolls should be protected in his possession, and we find the statute operates to confer this power by the decree. 40 Ohio L. 37. In the present race between creditors, whose equities are equal, this first authority to receive, seems to us to confer the priority to the receiver of Muskingum, and that all questions of appropriation and priority must be settled in the court to which he renders his account.

276] \*It will be noticed that this shape of the case renders unnecessary the decision of certain questions of the most grave and

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weighty character; such as those relating to the priority or equality between different creditors, and the right of the state to receive one-half of the tolls collected, undiminished by any debts save those for repairs. All these questions will arise, and may be settled in that suit.

For present purposes, so much of the bill will be dismissed as pursues the right to the tolls, either in the hands of Talmadge or of the company.

It will be entertained to compel answers as to those indebted to the company for unpaid stock. Order for answer and discovery.

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## WILSON N. BROWN v. THE STATE OF OHIO.

On an indictment laying a particular day when the plaintiff acted as an officer of an unauthorized bank, it is competent for the prosecution to prove the act after the day laid.

When such office is exercised in this state, it is not necessary for the prosecution to prove that the bank or association is not incorporated.

A sentence, that the defendant stand committed until the fine and costs be paid, is erroneous, and, *quoad hoc*, subject to reversal.

THIS is a writ of error to the court of common pleas of Hamilton county.

The facts appearing upon the record are stated in the opinion of the court.

WRIGHT & MINER, for plaintiff in error, made the following points:

1. The indictment names a single day, on which the offense was committed, without saying before or after, or \*using a [277 *videlicet*. The prosecution should, therefore, be confined to the day laid in the indictment.

2. The indictment charges the plaintiff in error with acting as an officer of an unincorporated bank. The burden is then upon the state to prove that the bank or association was not incorporated.

No arguments for the state came to the hands of the reporter.

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Wood, J. The facts, from inspection of the record, appear to be these: The plaintiff in error was indicted, and, at the July term of the court of common pleas, A. D. 1840, he was tried and convicted on the second count of an indictment, framed under the provisions of sections 1, 2, and 3, of the act passed January 27, 1816, entitled "an act to prohibit the issuing and circulation of unauthorized bank paper." Swan's Stat. 136.

Section 1 enacts: "That if any person shall, within this state, act as an officer, servant, agent, or trustee to any bank or moneyed association coming within the description contained in section 2 of this act, except a bank incorporated by a law of this state, he shall, for every such offense, forfeit and pay the sum of \$1,000."

Section 2 provides: "That every company or association that shall lend money, and shall issue, by their officer or officers, or by any other person or persons, bonds, notes, or bills, payable to bearer, or payable to order, and indorsed in blank, or use other shift or device whereby the bonds, notes, or bills, given by such company or association, or on their behalf, pass or circulate by delivery, shall be taken and deemed a bank within this act."

Section 3 is in these words: "That every person who shall act as a president, cashier, clerk, or director to any such bank, or shall in any respect assist in the discounting of paper, or lending money for such bank, or in paying out or receiving money for such bank, 278] or in any manner intermeddle, \*for the benefit of such bank, with its concerns; and every person whose handwriting shall appear on the bond, bill, note, or contract of such bank, whether as the drawer thereof, or witness, or payee and indorser, shall be deemed and taken an officer of said bank within the meaning of this act."

The count, on which the conviction was had, is of the tenor following:

"And the jurors aforesaid, on their oaths, do further present that the said Wilson N. Brown, on March 1, 1840, with force and arms, in the county aforesaid, *acted as an officer of a bank not incorporated by law*, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio."

The defendant was sentenced to pay a fine of \$1,000, and to stand committed until the fine and costs were paid.

A bill of exceptions was taken on the trial, from which it appears that, after the evidence was closed, the counsel for the ac-

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cused prayed the court to instruct the jury that, under said count, they could not convict the defendant unless they found he exercised the office therein mentioned *before* or *on* March 1, 1840, the only day named in that count; but the court, on the contrary, instructed the jury it was sufficient to convict the defendant if they found such office had been exercised on or before March 21, 1840, the day on which the indictment was found. To this charge of the court an exception was taken, and is now assigned for error. It seems to us, however, the court were perfectly right in their view of the law, in relation to the day laid, and that the instruction given is sustained by the authorities. In a late and most excellent work on criminal evidence (Roscoe's Criminal Evidence, 100), under the head of *Averments as to Time*, it is laid down that an indictment not alleging any time when the offense was committed, is bad; but, when laid, it is unnecessary to prove *the particular time* as laid, unless the time be \*material. Thus, [279 in treason, if the overt acts be laid on one certain day, evidence of them *after* that day, is admissible.

The court were also asked to instruct the jury, that the defendant could not be convicted, unless the notes put in circulation purported to be the notes of the association to which the defendant belonged, and not the notes of some other bank or association. This instruction was refused; but the court charged that it made no difference by whom the notes were drawn, whether by persons within the state or without it, or what shift or device was resorted to, to evade the law, if the association, or individuals composing the association, wrote their names upon their bills, in such manner as to make it their debt, binding them to redeem it, and gave it credit, by such signature, as money or currency. To this instruction an exception was taken, and is also assigned for error. We do not, however, perceive in it anything erroneous. The act purports, from its title, and such is the essence of its provisions, to prohibit the issuing and circulating of unauthorized bank paper. It is in the three first sections, under which the indictment is framed, directed against persons who act as officers of unincorporated associations, either in this state or elsewhere, if the office is exercised here. It was not necessary to a conviction, that the person charged as the officer of such unincorporated institution, should, in fact, be found by the jury to have issued notes of the company to which he belonged, or for which he was

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notoriously exercising the office. The language of the act is broad : "That every company or association, etc., that shall, by their officer or officers, or by any other person or persons, etc., lend money, and issue bonds, notes, etc., shall be deemed a bank within this act; and every person who shall act as president, cashier, etc., or shall, in any way, assist in lending, paying out, or receiving money for such bank, shall be deemed and taken an officer of such bank, within the meaning of this act." If, therefore, he act for any such association, in any capacity, as an agent, or his handwriting appear on the notes, or if he intermeddle with its concerns, for its benefit, he is brought within the energies of the law, and 280] \*the court, in their instructions, appear only to have enumerated the acts which this statute defines as violations of its provisions.

The court were also asked to instruct the jury, that they could not convict the defendant on said count, unless the prosecution proved that the association, acting as a bank, and for whom the defendant was an officer, had not been incorporated; but the court on this point charged that the jury should presume the association not incorporated, unless the contrary was shown by the defendant. An exception was, in like manner, taken to this part of the charge; and it is the only point, in our view, of doubtful or difficult solution. It is a general rule that the material averments in the indictment must be proved by the prosecution; but there are few general rules without exceptions. In England, it would, under a like statute, be indispensable for the prosecution to prove a similar averment, because all acts of incorporation, whether emanating from parliament, or charters granted by the king, are private, and no one is bound to notice them, unless they are pleaded; but here it is otherwise. All statutes are printed by authority, and, though local or special, are, nevertheless, *public acts*, of which courts of justice, *ex officio*, take notice. On the trial, therefore, when the prosecution proved that the defendant acted as the officer of a company or association, if it existed in this state, the court and jury, without the introduction of testimony, from their presumptive knowledge of the law, a public law, would be within the legitimate exercise of their functions, in assuming that an unchartered association *was so*. Such averment is, therefore, proved by a public law. If, however, the association for whom the defendant exercised the office, existed elsewhere than in

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Ohio, the rule would not hold. The private acts or statutes of other states must be private in this. The indictment in this case is general. It charges the defendant with acting as the officer of bank; but whether the company existed in this state, or elsewhere, does not appear; it is left to be supplied by the proof on the part of the prosecution. The statute gives this general form of the indictment, \*and this court, in the case of Noah Lougee v. [281 The State, at the last term, held it sufficient. Ante, 68.

If the association or bank for whom the defendant exercised the office, therefore, was out of the state, the charge that the prosecution was not bound to prove it unincorporated, was erroneous; but this does not appear by the bill of exceptions, and it should be presumed the association existed in this state, on the principle that every court of general jurisdiction is presumed *not to err* until the error is pointed out.

Another, and the last error assigned, is, that the court directed the prisoner, the plaintiff in error, to stand committed *until the fine and costs were paid*. It is the opinion of a majority of the court, that the court below, in this, exceeded the authority vested in it by law. When common law jurisdiction is entertained, and courts proceed according to its course, this power exists; but when offenses are statutory, punishments regulated by statute, and no such authority of commitment is declared, it is a power not conferred, does not exist, and can not be exercised; though it is equally clear, the court, after sentence, may direct the detention of a prisoner until he can be charged in execution. But commitment *until the fine and costs are paid*, is an addition to the punishment prescribed by law for the offense, and therefore illegal, and the judgment of the court, *quoad hoc*, must be reversed.

Judgment accordingly.

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\*CHRISTOPHER LAMBERTON v. THE STATE OF OHIO. [282

An indictment for resisting an officer in the execution of his duty, must set forth all the facts necessary to constitute the offense.

THIS is a writ of error from the county of Richland.

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The plaintiff in error was indicted under section 9 of the act of March 8, 1831, Swan's Stat. 242, for resisting an officer.

The indictment set forth that the plaintiff in error, "on, etc., at, etc., with force and arms, one David Bryte, then and there being sheriff of said county, and also then and there being in the execution of his said office as such sheriff as aforesaid, unlawfully did resist, contrary to the form of the statute," etc.

The plea of guilty was entered, and judgment rendered.

It is now assigned for error on the record, that the indictment does not set forth the act of resistance, the mode and manner of resistance, and that it is too general and indefinite in its terms and language.

T. W. BARTLEY, for plaintiff in error:

The plaintiff in error relies upon the following, among other grounds, for the reversal of the judgment:

1. That the indictment does not set forth nor specify the process or authority under which the officer was acting, nor does it allege that he acted under any process whatever.

2. That the indictment does not allege any particular act, nor the mode nor manner of the act of resistance.

3. That the indictment does not set forth, nor specify, all the substantial ingredients requisite to constitute the offense charged on the defendant.

Every indictment must contain a complete description of such facts 283] and circumstances as are requisite to constitute the \*crime charged. The proof must correspond with the allegations in the indictment, and no fact can be proven on the trial unless alleged in the indictment. It is essential that the indictment should show the act done, or mode of resistance, so that the court can judge whether it amounts to the offense or not. See 2 Hawk. P. C., chap. 80, sec. 23; 5 East, 244; 2 Stra. 1226; 2 Sol. Cas. 31; 1 Chit. Crim. Law, 227, 228. In order to make it appear illegal to obstruct, or refuse to aid a peace officer in securing a party whom he attempts to arrest, it is necessary that the arrest itself should be lawful, and this must appear from the indictment itself. 5 East, 308; 1 Smith, 555.

The case relied upon by the prosecuting attorney solely, is the case of *United States v. Bachelder*, 2 Gall. 15, as cited in the notes in 1 Russ. on Crimes, 336, and also in 2 Chit. C. L. 144. Upon an examination of the case in 2 Gall., it will be found that it is



not analogous, and does not sustain the prosecutor. That was the case of a revenue officer who possessed a general authority, by virtue of his office, to seize goods imported contrary to law; and a writ, or process of the law, had not to issue to clothe him with that authority. Also, in that case the indictment distinctly alleged the act of resistance, and described it. The principle settled in this case is different from what the prosecuting attorney supposed it to be, from the notes he referred to.

J. BRINKERHOFF, prosecuting attorney, for the state:

"It is not necessary, in an indictment for resisting a public officer, to set forth the particular exercise of office in which he was engaged, or the particular act or circumstances of obstruction." 1 Russ. on Crime, note *a*, new paging, 336, citing *United States v. Bachelder*, 2 Gall. 15.

"In an indictment for a statute offense, it is sufficient if the offense is substantially set forth, though not in the exact words of the statute." 1 Russ. on Crime, note *a*, new paging, 336, 337.

\*"Hence, on the act of Congress, which enacts that 'if [284 any person shall forcibly resist, prevent, or impede any officers of the customs, etc., in the execution of their duty,' etc., an indictment which alleged that the defendant 'did, with force and arms, violently and unlawfully resist, prevent, and impede N. J. in the execution of his office, as an officer of the customs,' etc., was held to be sufficient." 1 Russ. on Crime, note *a*, new paging, 336. See also 2 Chit. C. L. 144, note *a*.

In this case I deem it necessary only to cite the court to the case of the *United States v. Bachelder*, 2 Gall. 15, which is quite analogous, and the doctrine laid down by the court there fully sustains sufficiency of the indictment in this case.

BIRCHARD, J. It is a rule of criminal law, based upon sound principles, that every indictment should contain a complete description of the offense charged. That it should set forth the facts constituting the crime, so that the accused may have notice of what he is to meet; of the act done, which it behooves him to controvert, and so that the court, applying the law to the facts charged against him, may see that a crime has been committed.

A contrary doctrine would deprive the accused of one of the means humanely provided for the protection of innocence; the right of having the law of his case passed upon by judges learned

and experienced in matters of criminal jurisprudence. For how could a court determine, upon the face of this indictment, what were the facts upon which the grand inquest of the county predicated their conclusion, that the sheriff was unlawfully resisted in the execution of his duty? This indictment sets forth no fact whatsoever. It merely states a conclusion of law, predicated upon a supposed state of facts. Whether this conclusion was correct, or an error of the grand jury, we have no means of determining. For aught that appears, it may have been that the sheriff was executing an illegal writ, one without a seal, or issued from a court 285] having no jurisdiction, \*or from some other cause defective. It is not safe to trust to such general allegations in an indictment. They do not meet the intention of the framers of the constitution, who provided that every person should be allowed to meet his accuser face to face, and be furnished with the *nature and cause of the accusation against him*.

It is as general as would be an indictment for forgery, which followed merely the words of the statute, without specifying any act constituting the crime, or an indictment for perjury, which only set forth that a party swore falsely, knowing to the contrary, without setting forth what matters he stated to be facts, and then falsifying them. Would any one attempt to convict a person for passing a counterfeit bank-note on an indictment following the words of the statute, and omitting any description of such bank-note? And yet such an indictment would, in no respect, be less defective than this.

It would give the accused as much information of the nature and cause of the accusation sought to be proved against him, of the acts to be inquired into on trial, as does this. The day on which a crime is alleged to have been committed is not held, in general, to be material. It would not be, in an offense of this grade. The prosecutor, supposing the indictment to be good, might, without violating settled rules of law, have offered proof of an unlawful resistance, committed on any day prior to that specified in the indictment, and within the limitation of the statute. And, under this general form of indictment, the accused could not limit him to any particular day, until he offered proof of some act on some given day. It might, and doubtless often would happen in prosecutions, that the accused would be completely surprised by learning, in the midst of the trial, for the

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first time, that the transaction which he had prepared to defend against was not *the one* of which the state complained.

But it is said the case of the *United States v. Bachelder*, 2 Gall. 15, will sustain this indictment. If it would, I would overrule it, for it could not stand without violating the spirit of our bill of rights. But it does not sustain the doctrine contended \*for. [286] That was a prosecution under the revenue laws; the fact alleged was the resistance of a revenue officer. The act of Congress provided "that if any person shall forcibly resist, prevent, or impede any officer of the customs," etc. The indictment charged that Bachelder did, with force and arms, violently and unlawfully resist, prevent, and impede, etc.; and the question was, simply, whether the use of the words "*violently and unlawfully resist*," instead of "*forcibly resist*," were sufficient, and the indictment was sustained. That is all Bachelder's case settles.

It may be presumed, as was undoubtedly the fact, that the other parts of the indictment, which are not set forth in the report, were in due form, and clearly specified the acts of resistance; and the reason why those parts were not reported was, that they were not to elucidate the point decided.

In the case of *Ohio v. Johnson*, in which I was counsel, decided by Judges Lane and Wood, on the circuit, in 1834, on an indictment like this, the judgment was reversed. In 1837, before two other judges of this court, two judgments, in the case of the *State v. Shoemaker*, were reversed in the county of Geauga; the indictments were precisely similar in form to this. A like indictment was held defective, and judgment reversed by Judge Reed and myself, in the county of Wayne, on the last circuit.

It is admitted that this view taken of the case in 2 Gall. is different from that taken by the American editors of Russell and Chitty. But this fact only shows how unsafe it is to rely on digests, without examining the books of reports, from which the legal principles are supposed to have been gathered.

Judgment reversed.

**287] \*MARY PERLEE BRUSH v. SAMUEL BRUSH, PLATT BRUSH,  
ELIZA BRUSH, AND SUSAN ALBINA BRUSH.**

A deed of conveyance, made subsequent to a devise, does not revoke the will, unless it makes an entire disposition of the estate; but to any portion undisposed of by the deed, the will attaches, pro tanto, and carries it to the devisee.

THIS was a bill in chancery, for partition, from Sandusky county.

The facts and legal questions arising are stated in the opinion of the court.

READ, J. This case was reserved from Sandusky county. It comes up on a bill filed by Mary Perlee Brush, an infant, by her guardian, Platt Brush, seeking partition.

1. Of the remainder of that portion of Platt Brush's estate, which was set off as dower to Eliza Brush, his widow, against the heirs at law of the said Platt Brush, deceased; and,

2. Such estate as the complainant claims to inherit, with Samuel and Platt Brush, being sister and brothers of John T. Brush, as his heirs at law.

As to the first-named parcel of land, the remainder dependent upon the dower estate of Eliza Brush, widow of Platt Brush, deceased, there is no dispute; and, if it be desired, the case may be remanded for such proceedings as the parties may agree upon, or the court order.

But as to the second, the estate of John T. Brush, deceased, the question for determination here, is, whether he left any estate undisposed of, to descend to his sister, Mary Perlee Brush, and his brothers, Samuel and Platt Brush, as his heirs at law; and if so, what estate?

The determination of this last question depends:

1. Upon the validity of the will of John T. Brush, executed **288] September 21, 1840, making \*entire disposition of his whole estate to his wife and children, if any; and,**

2. Upon the validity of a deed of trust, executed by John T. Brush, on October 31, 1840, operating upon the same estate; and,

3. If both are valid, their construction and effect. If the deed is invalid, and the will prevails, the whole estate of John T. Brush is disposed of, and nothing remains to his heirs for partition. If the deed is *valid*, it remains to determine whether it operates as an entire revocation of the will, or only in part; and if it totally destroys the will, whether any estate remains to the heirs; and, if in part only, and both will and deed stand together, whether they entirely exhaust the estate, and leave nothing to descend at law to the heirs.

We will consider, first, of the validity of the deed :

Susan Albina Brush, widow of John T. Brush, deceased, claims, in her answer, that the whole estate is hers under the will; and that the deed of trust to Samuel Brush is invalid, because her husband, John T. Brush, at the time of its execution, was incompetent to make a deed, either from being actually insane at the time, or, at least, in such a state of mental imbecility, from drunkenness and long habits of intemperance, as to be incapable of making a contract; and that Samuel took advantage of the unfortunate situation of his brother, corruptly to procure this deed, for the purpose of revoking the will and defrauding the respondent.

To this point the whole body of the testimony in the case has been directed. It discloses that John T. Brush had been, for many years, habitually intemperate. That the family witnessed, with grief, its rapid advances; and felt that, unless he could be restrained, he must soon fall its victim. Every effort was made, and especially by Samuel, who spared no means to reform his brother. His kindness was reciprocated by John, who relied upon him in every time of need and distress. When their father died, in August, 1840, and a division of his estate was had among the heirs, and John came into the possession of his portion, Samuel perceived that \*it would soon be swallowed up by dis- [289] sipation and sharpers, who would take advantage of the intemperate situation of his brother, and rob him of his property. John had married a wife; there was promise of offspring, and a certainty that, unless something was done, poverty would soon come with dissipation, and destitution and want be added to the misery of drunkenness. To reclaim the brother, and protect his wife, it was a family arrangement that John should move on to his farm in Seneca county. It was hoped that thus removed from

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his evil associations, he would reform; but, not reforming, and contracting debts, he felt himself, as well as did his friends, that he must soon be reduced to utter destitution. Samuel felt deeply upon the subject. He desired, if possible, to secure to his brother and his family a support, and provide for the wife and children, if any, in case of John's death. He consulted with his friends; and, upon the advice of distinguished counsel, it was concluded to take a deed of trust to Samuel, to hold the real estate of John, for the use of John and his family. In pursuance of this arrangement, John T. Brush executed a deed, dated October 31, 1840, to Samuel Brush, in trust, to pay over the rents and profits to his wife Susan Albina, for their joint support, and the support of the children; and, in case of his death, the profits of one-half of the estate to support his widow during life, and the profits of the other half to the guardian of his children, for their support; and, in case of the death of the wife, the whole estate to go to his children.

A few days after the execution of this deed, John died of *delirium tremens*. He had concluded to leave off drink. Samuel had hired his brother, Platt, and paid him to go to John's and take care of him, whilst he made the effort to leave off liquor. *Delirium tremens* was the consequence.

Nothing is disclosed by the proof, to show in Samuel anything but the conduct of a kind and affectionate brother. Indeed, the whole evidence shows that Samuel, throughout, was actuated, in his conduct toward his brother and wife, by the most praiseworthy motives; and we are happy to be able to add, that so far from any fraud being imputable to him in the procurement of the deed, the evidence bears much honorable testimony of the pure considerations and affection which have governed him in this whole transaction.

But was John of sufficient mental capacity to make this deed? The proof shows that, at the time he made the deed, he was as capable of doing business as he had been for months; that he understood his interests at the time, and conducted business as usual. True, some say that they would not trust him to do business for them; but who would trust an intemperate man with business of importance? But certainly he may be permitted to contract for his own benefit, to secure his property to himself and family.

The very nature of the deed, as well as the proof, show that the

protection of John's interest, and to prevent his estate from being squandered, was the object in the execution of this deed. We regard this deed, then, as valid.

Does it revoke the will?

The will bequeaths all his property, both real and personal, of which he may die possessed, either in law or equity, to his wife, Susan Albina; but in case of children, the one-half to go to them, and the other half to the wife. No child was born alive, to take under the devise, and the contingency not happening, the will vests the whole estate in the wife. This will bears date September 21, 1840.

The deed differs from the will. The will gives the widow the whole estate, if there be no children; and, at all events, the fee of one-half. The deed secures her only a life estate in the one-half. If the deed had disposed of the whole estate, it would revoke the will.

The contingency failing to happen, which would have vested the rest in the heir, and carried the entire estate, the trust results in favor of the grantor, to be inherited by his heirs; and hence, a portion of the estate is left undisposed of by the deed, to descend as at law.

\*The act relating to wills in sections 37 and 38, Swan's [291 Stat. 997, provides that a conveyance, settlement, deed, or other act of the testator, by which his estate, or any interest in property, previously devised or bequeathed by him, shall be altered, but not wholly divested, shall not be deemed a revocation of the devise; but such devise or bequest shall pass to the devisee or legatee the actual estate or interest of the testator, which would otherwise descend to his heirs or pass to the next of kin, unless, in the instrument by which such alteration was made, the intention is declared that it shall operate as a revocation of such previous bequest or devise. So, in section 38, it is provided that when there is a total disposition of the property, it shall operate as a revocation, unless it be upon a condition or contingency, and such condition be not performed, or such contingency do not happen.

Thus, when there is a will devising the whole estate, and a subsequent conveyance or deed which does not divest the whole estate, it does not revoke the will, but the devise operates *pro tanto* upon that portion not divested.

The rule is this: If the will conveys the whole estate, and the

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subsequent disposition, by deed or otherwise, does not transfer the whole estate, but leaves a portion which would descend as at law, the devise attaches to such descendible portion, and carries it to the devisee.

Now, in this case, the heirs of John T. Brush, his sister and brothers, claim, as heirs at law, the one-half of the estate conveyed in trust, to be held for John's children, if any, and the reversion in the other half dependent upon the life estate of Susan Albina.

Thus, by the deed of trust, there is one-half of the estate named in it, and the reversion of the other half undisposed of, which, if there is nothing to prevent, would descend to John T. Brush's heirs at law.

Thus, although the nature of the estate, by the deed of trust, was converted from a legal into an equitable estate, and, as there 292] was no express revocation of the will under the statute, \*it attaches to all that portion of John T. Brush's estate which would descend to his heirs at law, and vests it in the devisee, Susan Albina. Hence, although the deed and will are both valid, yet they dispose of the whole estate, and nothing descends to the complainant, but the whole belongs to Susan Albina, the respondent. Therefore the bill is dismissed; but, as it is the case of a minor seeking her estate, the court decree no costs.

S. BRUSH and G. SWAN, for complainants.

R. P. BUCKLAND, for defendants.

Bill dismissed.

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**ALLEN CADWALLADER v. THE GRANVILLE ALEXANDRIAN SOCIETY,  
JAMES DOSTER, ET AL.**

A judgment creditor may pursue different interests of the debtor, and against different persons, in the same bill. A judgment creditor may demand from his debtor, in general terms, a disclosure of his assets and the names of his debtors.

THIS is a bill in chancery from Muskingum county.

The bill shows that the complainant has a judgment against James Doster and others, which is unsatisfied, and that the judgment debtors have no property liable to execution at law; that



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an execution issued upon his judgment, and was levied on March 5, 1842, on all the interest of Doster in a parcel of land, situated in Morgan county, Ohio, and in a certain water privilege thereto belonging, which land and easement were leased, by the State of Ohio, to one Concklin, and by him assigned to Doster and Cassell; that Doster and Cassell's title is supposed to be only equitable, by reason of the \*want of an acknowledgment to the [293 assignment from Concklin; that Cassell has no *bona fide* interest in said premises, but became a party to the assignment to defraud Doster's creditors.

That the Granville Alexandrian Society, of Licking county, pretend to have some interest in, or claim to, the premises and hydraulic power aforesaid, and in other property of said Doster's, by way of mortgage or otherwise; and which said interest, if any such exist, arose out of and was created by banking operations, carried on in violation and in fraud of the several acts of the general assembly of the State of Ohio against unauthorized and illegal banking, by the Granville Alexandrian Society, the said society not being a bank incorporated by law. That the said Granville Alexandrian Society was not authorized by law to transact banking business, and that all interest, claim, or lien of the said Granville Alexandrian Society in, to, or upon the said premises and hydraulic power, or upon either of them, were, by the said Doster and Cassell, given to said society for and on account of the notes and bills thereof, issued and intended to circulate as money, by the said society as a bank, and by the said society lent, by way of banking and discount, to the said Doster and Cassell, for the use of said Doster; and that all such pretended claim, interest, and lien, being in violation of the several laws of this state against unauthorized banking, are fraudulent and void. The bill proceeds to allege that a cloud is cast upon the title by reason of this pretended claim of the society, and that Doster fraudulently sets it up to defraud his creditors.

The society is called upon to discover all property transferred or sold to it by Doster and Cassell, or either of them, and to release its pretended claim aforesaid. The bill has no charge of combination, and alleges no participation of the Granville Alexandrian Society in the fraud of Doster. It prays that the premises and hydraulic power, and all the interest of Doster and Cassell

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in said lease, be sold, and the proceeds be applied to complainant's judgment, and for general relief.

294] \*To this bill the Granville Alexandrian Society demurred, assigning for demurrer :

1. That the said bill is multifarious in this, that it seeks to draw in question the title of the demurrants to the mortgaged premises described in said bill ; and seeks discovery and relief from their said co-defendants, Doster and Cassell, wholly independent thereof, and touching matter with which these demurrants are in no way concerned.

2. That there is no matter to impeach or draw in question the title or interest of these demurrants to said lease and demised premises, inasmuch as it appears that the contract between these demurrants, and Doster and Cassell, touching said lease and premises, is fully executed.

3. That nothing is shown in said bill to impeach the title of these demurrants to said lease and premises, for want of power and authority, on the part of these demurrants, to accept and receive such title, and the assignment thereof.

4. That if anything is shown to impeach said title, or to avoid the assignment of said lease to these demurrants, and the interest conveyed to them thereby, that matter of avoidance can not be set up by the complainant.

5. That the said bill shows that neither the said Doster, nor the said Doster and Cassell, have such title to said lease and mortgaged premises, as can be sold by execution at law.

Doster assigned for additional cause :

6. That neither the State of Ohio, nor her authorized agents, nor the person holding the legal title to the said demised premises, are made parties to said bill.

7. That the said bill charges that this demurrant was formerly possessed of large and valuable property, both real and personal, without describing said property, or any part thereof, and asking a discovery relating thereto, whereas no relief could be granted if such discovery were made, or if said allegation were true.

8. That the charges in the bill respecting the property, money, 295] notes, choses in action, etc., of the demurrant, are \*too vague and general, and the bill does not show that he is now possessed of any of the said property, or choses in action, or money, or that if he were, the same are subject to the action of the court.

9. That the persons indebted to him, on the said choses in action, are not made parties to this bill.

10. That the discovery asked of all the transactions of this demurrant, for the last six years, is not warranted by any of the charges of said bill.

H. STANBERRY and T. EWING, for demurrants :

We claim, for the Granville Alexandrian Society, that no case is made against it for equitable relief.

The bill does not charge the society with any fraud or combination, but claims that it holds some interest in the leased premises, by mortgage or otherwise, which was given or conveyed to the society by Doster and Cassell, on account of the notes issued by the society as a bank, and lent by the society to Doster and Cassell in the way of banking; and that, as the society has no banking powers, such interest is void, as against the laws in restraint of illegal banking, and prays a discovery of the interest so held by the society, in order that it may be declared void.

It is not alleged, by the bill, that the society has no capacity to hold lands; but the bill proceeds upon the fact, that an interest in the land, or the chattel real, is in the society by virtue of some transfer from Doster and Cassell, and the object of the bill is to take this interest from the society, or to declare it void, for the benefit of the complainant.

1. We insist that a court of equity will not compel a discovery, or lend its aid in order to enforce a forfeiture. *Dunham v. Fanning*, 5 Johns. Ch. 145; *Beach et al. v. Fulton Bank*, 3 Wend. 573; 2 Bridg. Eq. Dig. 418; 2 Ball & Beatty, 125.

2. The complainant is in no privity with this land; he has not purchased it, is a stranger to it; and, if the court declare the contract void, *non constat*, he will ever purchase. *Green* [296 v. Kemp, 13 Mass. 515.

The case of a conveyance to defraud creditors, stands upon a different ground. The court only declares the conveyance void as to creditors; it leaves it in force between the parties to the conveyance. The statute makes it void as to creditors, and, therefore, without a purchase, a creditor at large may avoid it.

3. This society had power to hold lands by the second section of its charter. The title passed to it, by assignment, from Doster and Cassell; and, if it were prohibited from holding lands, upon an illegal consideration, and liable to forfeit those lands for viola-

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tion of law, the state is the proper party to take advantage of that forfeiture. *The Banks v. Poiteaux*, 3 Rand. 141.

4. The contract by which the society holds lands is not executory, but executed. The bill charges that some interest has been given to the society by mortgage or otherwise. Now, admitting that the loan was void, or that the note which contains the promise to pay is void, yet this executed thing is not void. 7 Ohio, 71; 3 Ves. 613.

GODDARD & CONVERSE, for complainant, insisted:

That the bill is not multifarious. 6 Johns. Ch. 139; 12 Maine, 164; Wright, 729; 4 Johns. Ch. 199, 204; 1 Eng. Cond. Ch. 160; 8 Wend. 339.

That the complainant is entitled to have the premises mentioned in the bill sold, disincumbered of the pretended lien of the Granville society. 2 Hill, 522; 4 Pet. 205, 228; 3 Wend. 574, 584; Swan's Stat. 137, sec. 9; Swan's Stat. 154, sec. 64.

That the holder of a legal title need not, and, in the present case (the state holding that title), can not be defendant. Swan's Stat. 297] 704, sec. 14; 1 Paige's Ch. 637. And *\*Miers. etc. v. Zanesville and Maysville Turnpike Road Company*, decided at the present term.

That the seventh, eighth, ninth, and tenth causes of demurrer by Doster are not well taken, and that complainant is entitled to the relief prayed for as against Doster and Cassell. 6 Ves. 788; 3 Wend. 618; 1 Paige's Ch. 168, 170; 3 Paige's Ch. 234; Miers, etc., v. Zanesville and Maysville Turnpike Road Company, *ut sup.*

That the demurrer to the whole bill is bad, if the complainant is entitled to an answer to any one of the matters stated in the bill; being bad in part, is bad *in toto*. 4 Ohio, 385; 9 Pet. 632.

LANE, C. J. This bill is filed by a judgment creditor of Doster, to discover his effects, from which the complainant may obtain satisfaction of his judgment.

To this bill, the defendants demur.

The right of a judgment creditor, seeking satisfaction, to demand, generally, from his debtor, a disclosure of his assets and the names of his debtors, without more minute specification, is maintained by this court in another case, decided at the present term—*Miers et al. v. Zanesville and Maysville Road Company*. The complainant is therefore entitled to a full answer from Doster.

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Cadwallader v. Granville Alexandrian Society et al.

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The bill states, amongst other effects of Doster, which it pursues, that he, together with one Cassell, held an equitable leasehold interest in certain lands and hydraulic power from the state; that, in truth, it belongs wholly to Doster. That the Granville Alexandrian Society set up some interest by way of mortgage, which interest or claim arose out of illegal banking operations. That all their interest, claim, or lien on the premises, were given by Doster on account of notes illegally issued, and intended to circulate as money, in violation of the law, and void. The Granville Alexandrian Society is therefore required to disclose what property it has received from Doster, and release its interest. The society demurs to this disclosure, on the ground that it may sub- [298] ject it to forfeiture, or its officers to penalties.

It is conceded, that where a forfeiture or penalties may ensue from the answers to a bill, the defendant is not bound to make it. But the complainant insists, that a demurrer, which covers too much, can not be sustained for any part; and that here, although the society may justly decline answers touching the consideration of the mortgage, they ought to disclose the amount of property transferred, and the extent of their claim to it.

The proper rule of practice, in this respect, is not contested, and we are called upon to decide if this is a case for its application. If this bill had been framed in the alternative, demanding of the defendant what property they derived from Doster, charging that it was under an illegal and void agreement, and asking that it might be set aside, or that, if it should be held valid, the residuary interest of Doster might be subjected to his debt, it would afford an example which the defendant would be protected in withholding a disclosure to a part of the bill, while he would be bound to answer the remainder.

But the mind of the pleader did not embrace such an alternative. He assumed the whole dealings between Doster and the society were illegal, and sought to set the whole aside, without making a statement broad enough to cover a case in which the validity of the mortgage to them could be maintained.

We think his antagonist was warranted in believing that he intended to prefer his claim under no aspect, except on this hypothesis, and is justified in withholding his answer.

Demurrer sustained.

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Slipher v. Fisher and Cooch.

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**299] \*STEPHEN SLIPHER v. ISAAC FISHER AND LOWEN R. COOCH.**

In a suit against principal and surety, a plea, by the surety, that the time was extended without his consent, is bad, not being an answer to the whole cause of action.

Proceedings may be arrested at any stage of the case, when it is discovered that judgment would be arrested after verdict.

THIS is a motion for a new trial, in an action of *assumpsit*, from the county of Butler.

The declaration in this case is founded on a promissory note, bearing date August 12, 1838, for \$770, payable twelve months after date, to the order of the plaintiff.

The defendant, Fisher, filed the plea of the general issue; the defendant, Cooch, a like plea; and also a plea in bar of the action, that after the note fell due the plaintiff contracted with the defendant, Fisher, to extend the time for the payment of the note one year, in consideration of the payment of ten per centum interest, which was paid and indorsed on the note. The plea then avers that Cooch was only a surety for Fisher, and that such agreement was without his knowledge or consent.

On this plea issue was joined, and the cause came on to be tried before a jury at the last term of the Supreme Court, when the defendant, Cooch, offered evidence of the facts set up in his special plea; but the court decided, and so instructed the jury, that such defense could not be made at law, but only in chancery. On this instruction of the court the jury found a verdict for the plaintiff, and the defendant, Cooch, filed his motion for a new trial on the ground that the court mistook the law, and erred in their instruction to the jury.

ELIJAH VANCE, for plaintiff:

The first question which presents itself is, whether the defendant, Cooch, when sued by Fisher, at law, can be permitted  
**300]** \*to set up the defense made by his special pleas; and, upon this question, it has been decided, in the case of *Farrington v. Galloway*, 10 Ohio, 543, that where the suit is brought against the defendants jointly, and the matter offered in evidence was not a good defense as to all the defendants, one of them could not take

advantage of it to defeat the action at law, but his remedy is in equity. The authorities cited by the defendants' counsel, to wit, 5 Ohio, 214 and 6 Ohio, 18, do not come in conflict with the decision of this court above quoted, for the reason that in the last mentioned cases the security, in the one case, and the representatives of the security, in the other, were sued alone; and, as a matter of course, had a right to set up this matter of defense at law.

The next question presented, by the motion now pending for a new trial, involves the inquiry as to whether the defendant has gained the right thus to defend himself at law, in consequence of an issue of fact having been taken upon his special pleas, instead of an issue at law. In the case of *Thornton v. Sprague*, Wright, 645, which was an action of replevin, the court decided that a plea, *non cepit*, is an immaterial plea, and, therefore, the issue being of no moment, the finding upon it secures no legal consequences, etc. See also 5 Ohio, 108. In *Bates v. Cooper*, 5 Ohio, 115, the court have said that, after a verdict, an objection to the form of the plea, either for the purpose of obtaining a new trial or a repleader, will not be received, etc., particularly if it appear not to be in furtherance of justice, etc.

But there is another principle of law which, it is believed, may be properly called in aid of the settling of this point. A new trial will not be granted for a defect in pleading (5 Ohio, 108; 1 Johns. 510; 15 Johns. 212), and, most certainly, not in aid of the party who pleads an immaterial plea. Neither can a repleader be granted in favor of the person who is guilty of the first fault in pleading. 1 Chitty, 694; 1 Ld. Raym. 170; Doug. 396, 747; 2 Strange, 994; 9 Bing. 532; 3 Hen. & Munf. 388. See also 5 Ohio, 108, 115.

\*Take, therefore, the ground assumed by the defendants' [301] counsel, that the pleas filed by him are immaterial, making an immaterial issue; still, when he has committed the first fault, he can neither insist upon a new trial, nor for the granting of a repleader.

It is scarcely presumable that the defendant will insist that a new trial should be granted him for the cause that he may have matters of defense, other than those disclosed by his pleadings.

No argument for defendants came to the reporter's hands.

Wood, J. To sustain this motion, the counsel for the defendant have cited the *Bank of Steubenville v. Leavitt et al.*, 5 Ohio, 207,

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Slipher v. Fisher and Cooch.

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and the Bank of Stoubenville v. Hoge et al., 6 Ohio, 18. In the first, the question was distinctly made, and appears to have been well considered; numerous authorities cited on which the decision is predicated, and the doctrine unequivocally maintained that such defense may be made at law.

In the latter case, the same point was again before the court, and it is there asserted that when, by the forms of pleading, the evidence is admissible, the defense may as well be made at law as in equity; and delay should not be increased, and the expenses of litigation multiplied, by sending parties into another forum. These decisions, however, are inapplicable to the case at bar. There, the sureties only were before the court, and it would have been strange, indeed, that any other rule should have been maintained. *The pleas were full and perfect answers to the whole declaration.*

In the case now before the court, no analogy is perceived. The suit is on a joint obligation. The writ issued against both principal and surety, was served upon both, and the declaration follows the process.

In such a case, at common law, judgment must be against both, 302] or neither, except in the isolated case of personal privilege, \*as infancy, when judgment may be rendered against the adult alone.

This being the common law, and modified by no statute, where the suit is against all, it follows that whether the plea be joint or several, it must be an *answer to the entire cause of action*.

If bad in part, it is bad for the whole. The plea in this case is a bar for Cooch *only*, while it leaves the cause of action unanswered as to Fisher; and, upon the principle before stated, as it is bad for part, it is bad for the whole.

This question was distinctly presented to the court at the last term, on an application for the allowance of a writ of error. The action was instituted on a note *in hæc verba* :

"\$1,040. Six months after date, we, or either of us, promise to pay E. Farrington, or order, \$1,040, for value received." Signed "Galway & Myers, Galway, Jr., George Myers." Plea, the general issue.

On the trial, the defendant, George Myers, offered to prove that he executed the note as security for the other defendants; that the plaintiff, at the time, knew it; that when the note became due, the plaintiff, in consideration of the payment by the principals of a large sum of money for usurious int. rest, agreed with them to



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Bowman v. Hilton.

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give further time to pay the note, until, etc. This evidence was rejected by the court, and a bill of exceptions taken. On the application being made for a writ of error, a *non allocatur* was indorsed by all the judges, on the ground that as the suit was joint, and the matter offered in evidence was not a good defense as to all of the defendants, one of them could not take advantage of it to defeat the action at law, but his *remedy was in equity*. On this application, it is true, we had not the aid of learned counsel to assist us in our conclusion, but it was, nevertheless, believed to have been well considered.

It is, however, argued by counsel that if the issue were immaterial, and the evidence offered is relevant, the court are bound to receive it, and after verdict award a repleader.

This court never hesitates to arrest the trial at any stage of the proceedings, when it is discovered, if a verdict is taken, \*the [303 judgment must be arrested. Any other course would be a useless delay of time, which the technical forms of proceeding should not be suffered to produce, unless in very special cases.

We think the court did not err, and that judgment should be entered on the verdict. Judgment for plaintiff.

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JAMES BOWMAN v. BRICE HILTON.

A common carrier, receiving goods in the ordinary course of business, and in the proper line of transit, has a lien for the freight and charges paid, although the goods may have suffered damage before they reached him while in the hands of some preceding carrier.

THIS is a motion for a new trial, in an action of replevin, reserved from Williams county.

On the trial, it appeared, in evidence, that the plaintiff shipped a lot of goods from Cleveland, marked "Jacob Bowman, Williams Centre, care of Forsyth & Hall, Maumee City, Ohio." Forsyth & Hall having relinquished the business, the goods were left with Smith, Howe & Co., of the same place, and by them sent to P. B. Brown & Co., Providence, and by him shipped by boat, Eber Hilton, master, to Brice Hilton, Brunersburg, Williams county, Ohio,

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who paid the charges thereon from Cleveland to Brunersburg. The goods, when taken from the warehouse of Hilton, at Brunersburg, upon the writ of replevin, were damaged to the amount of one-quarter or one-third of their value, which was about \$900; said Hilton claiming a right to retain the goods for the charges by him paid.

Upon this state of facts, the plaintiff asked the court:

1. To instruct the jury that Brice Hilton, by receiving said 304] goods, made himself liable for any damage done to them \*in the course of their transportation from Cleveland to Brunersburg, whether done by him, his agents or servants, or any other person; and,

2. That if such damage amounted to a sum greater than the freight and charges, that they must return a verdict for the plaintiff for nominal damages.

The court thereupon instructed the jury, that they should make the deduction in case they found that the damage to the goods occurred by the negligence of the defendant, or some one with whom he was in partnership; but not if they found that the damage was occasioned by any person other than Hilton, or his partners, although they were engaged in transporting the same goods.

For this direction to the jury, the counsel for the plaintiff ask the court to grant a new trial.

LELAND & SPINK, for the plaintiff.

D. HIGGINS, for the defendant.

BIRCHARD, J. A correct determination of this motion requires, to some extent, a consideration of the responsibilities which the law casts upon common carriers. The general rule is, that they are bound to carry safely, and deliver in good order, at the place of destination, the goods which they contract to carry. That for the acts of commission or omission, of agents or servants, occasioning damage, the principal is equally liable as for acts of his own. And in case of loss or damage, the presumption of law is against the bailee, unless he shows it was occasioned by the public enemies, or such acts as could not happen by the intervention of man. That when a responsibility has begun, it continues until there has been a proper delivery, or the party has, in some way, been discharged of his peculiar relation to the property. A question arises incidentally, in this case, concerning the commencement

and termination of the relation of carrier, by the several persons engaged in transporting these goods.

The owner shipped them \*from Cleveland to Williams [305 Centre, to the care of Forsyth & Hall, Maumee City, which was an intermediate point. On their arrival at this place they were delivered to Smith and Howe; Forsyth and Hall, to whom they were consigned, were not in business. Conformably to the usages of trade, the carrier for the first stage did his duty under the circumstances, by depositing with a responsible warehouseman. This would determine his duty, entitle him to receive his freight, and impose upon the warehouseman the duty of forwarding the goods in accordance with the original design of the owner. Smith and Howe gave the goods such direction, and they ultimately came to the defendant's possession, within the originally designed line of transit, from the place of shipment to the point of ultimate destination. They were received in the ordinary course of business, in good faith, in apparent good order, by the defendant, who paid the costs and charges. Had he been, in any legitimate sense, the agent of the bailee, in whose hands they received the injury, the jury could not have allowed the lien set up by him under the charge of the court. Such was not, however, the defendant's position. By the usages of the trade, he became, for the purposes of paying charges, and receiving and forwarding from Brunersburg to Williams Centre, the agent of the plaintiff, and his lien attached for the moneys expended in an honest endeavor to discharge his duty. Liens of this kind are said to be favored in law, and are not subject to the objections against general liens. From the general course of business, and the directions upon the goods, the defendant had a right to receive them from his immediate consignor, and to presume that the owner had duly authorized the consignment. To entitle him to claim his lien for commission and advances, the law imposed upon him nothing beyond what a prudent man would, under like circumstances, have done in the discreet management of his own business. Nothing appears in this case which should deprive him of his lien, or that required different instructions to the jury. Motion overruled.

**306] \*NELSON J. ELLIOTT AND RICHARD S. ELLIOTT v. GEORGE H. ELLERY.**

A general and standing order of the court of common pleas, directing the clerk to issue execution for his own benefit, and at the instance of any person entitled to costs, will authorize the clerk, without any special order, to issue such execution.

THIS is a *certiorari*, from the court of common pleas of Cuyahoga county, to reverse certain proceedings in that court, on a motion to retax costs.

Judgment had been rendered against the defendant in a suit pending in said court, wherein Nelson J. Elliott and Richard S. Elliott were plaintiffs. The clerk's and sheriff's costs, made by the plaintiff, were taxed at nine dollars and seventy-two cents, for which the clerk issued execution against the plaintiffs, on August 16, 1841. The writ followed the form prescribed by the act to regulate the taxation and collection of costs. Swan's Stat. 405.

The execution was returned, at the November term, satisfied, and, on its return, a motion was made to retax the costs, because the clerk had, for his own benefit, issued the execution without any order of the court, and because the costs of issuing the execution, and the costs made thereon, were taxed against the plaintiff.

On this motion the following order was made:

"The court, being fully advised in the premises, are of opinion that the execution set forth in said motion was illegally issued by the clerk, and order that said execution, and the proceedings under it, be and the same are hereby set aside and held for naught, and that the cost accruing under, and by virtue of said execution, be retaxed, and taxed to the clerk, at whose instance said execution issued."

A bill of exceptions was taken by the clerk. The bill showed a standing order, entered on the journal of the court, at the October term, 1835, and in force at the time the execution was issued. The order was as follows:

**307] \*"**Ordered by the court that, in all cases where the party recovering judgment in this court shall neglect to sue out execu-

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Elliott and Elliott v. Ellery.

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tion immediately; or, after execution shall have been returned without satisfaction of costs; or, where costs are adjudged against either party on continuances, amendments, or any special rule, the clerk may, for his own benefit, or at the instance of any person entitled to fees in the bill of costs, issue execution against the party indebted to such clerk or other person, for such fees, whether plaintiff or defendant, at any time after the expiration of the time given for the payment of the same, agreeably to the act regulating the taxation and collection of costs; and this is made a standing order of this court."

It was agreed that execution had been first issued against the defendant, without satisfaction of costs. In these proceedings, it was assigned for error, that the court held the standing order of the common pleas inoperative; had set aside the execution, and taxed the costs made thereon against the clerk.

H. RICE argued:

That, upon a proper construction of the statute, the clerk was authorized, at his own instance, to issue execution for costs, without any order of the court. That the words of the act, "by order of the court," referred only to such costs as might be taxed by order of the court. But that, if any order were necessary, the general and standing order was sufficient, without direction for execution in each case; and, that execution having been issued and returned unsatisfied, the clerk was fully authorized to issue against the plaintiffs in the suit below for the costs made by them.

BOLTON & KELLY, contra.

READ, J. The determination of the question, in this case, depends upon the construction of section 4 of the act regulating the taxation and collection of costs. Swan's Stat. \*405. [308 The execution issued by the clerk included the plaintiffs' costs and costs of the execution, and such costs as might accrue under it. Had the clerk the right to issue such execution? Section 4 of the act above cited is as follows:

"That when the party recovering judgment shall neglect to sue out execution immediately, or after such execution shall have been returned without satisfaction of costs, the clerk may, for his own benefit, or shall, at the instance of any person entitled to fees, in a bill of costs, taxed against either party, and by order

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of court, issue against the party indebted to such clerk or other person, for such fees, whether plaintiff or defendant, an execution to compel the party to pay his own costs."

The form of the writ prescribed, commands the sheriff to make not only the original costs for which the writ issued, but also the costs of the writ itself so issued, and all the costs that may accrue. Thus, the person against whom this process under the act issued, is charged with the costs of such process, as well as the original amount of costs adjudged against him.

The question then is: May the clerk, at his own instance, and for his own benefit, or the instance of any person interested in the costs, issue such process without an order of court; or, if there must be an order of court authorizing it, must it be a special order in each case, or may it be upon a general and standing order of the court for all cases?

Must there be an order at all to authorize the clerk to issue? The object of the statute is to confer power upon the clerk to issue execution for the costs due himself and others, when the party having judgment fails to do so; or, where doing so, the execution is returned unsatisfied. It was to enable the persons to whom the costs were due to collect the same, without awaiting the tardy action of the parties to the suit, or from being driven to a distinct action to recover the same.

The whole solution of this question depends upon the fact, whether the clause, "by order of the court," refers to the taxation of costs, or to issuing the writ of execution. The clause of the act is in these words: "The clerk may, for his own benefit, 309] \*or shall, at the instance of any person entitled to fees in the bill of costs, taxed against either party, and *by order of the court*, issue against the party indebted." Shall he not then issue for costs regularly taxed, in accordance with the fee bill, and such costs as, by order of court, may be taxed against either party? The court often directs one party to pay costs which he would not, except for such order, be compelled to pay, as a condition to some favor which he seeks at the hands of the court, that delays or is detrimental to the other party. How can the clerk issue immediately (upon the contingency happening named in the statute), if he is to await the order of the court to issue? Why say he shall issue at the instance of any person entitled, if it can only be done by order of the court? Why should it be done by

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Kelly et al. v. Collins.

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order of the court? The amount of costs are already ascertained by the original judgment.

It would read, on this construction, "the clerk shall issue, at the instance of the person entitled, and by order of court." The clerk shall issue by order of the court. This he would have been compelled to do without this act. Whenever the court award execution for costs, it is the duty of the clerk to issue it. What is awarding execution but ordering execution? It then comes to this: that, whenever the court order execution, the clerk shall issue. Why, then, say he shall issue at the instance of the party entitled? It appears to me, that the phrase, "by order of the court," applies to taxation of costs, and embraces such costs as the court order, in the progress of a suit, either party to pay.

We all are of opinion, that a special order is in no case necessary; but a general order, directing the clerk to issue in all cases, as in the order set out, is sufficient to authorize the clerk to issue a writ of execution for costs. Upon the construction, that some order of the court is necessary to authorize a clerk to issue execution under the statute for costs, a general order is a full compliance with the statute; and, hence, it is not necessary to decide more than this point to determine this case.

\*Such general order, being in full force at the time that [310 the clerk issued the execution, the court below erred, both in setting aside the execution, and taxing the costs accruing under the same to the clerk. Proceedings reversed.

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IRAD KELLY ET AL. v. ALEXANDER L. COLLINS.

The omission to make the certificate, which judgment debtor is principal, and which is surety, can not be corrected by a writ of error.

THIS is a writ of error to the Supreme Court of Cuyahoga county.

The plaintiffs in error gave a joint promissory note, which came by indorsement into the hands of Collins. The signatures were as follows: "Gay & Hubbell, Irad Kelly, surety, Abraham Hickox."

In the suit on this note, the common general judgment was ren.

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Lamb v. Rickets.

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dered against all. A writ of error was prosecuted, because the court omitted to find, or certify the fact, that Kelly was surety. At the term of the Supreme Court of Cuyahoga, in 1841, the judgment of the common pleas was affirmed. This writ of error is brought to reverse both the original judgment and the judgment of affirmance.

No arguments came to the hands of the reporter.

LANE, C. J. Whenever it is made to appear to the court rendering a judgment, that one of the parties is a surety, the court is [311] required to certify which is principal and which is surety, so that execution may be first levied on the property of the former. Swan's Stat. 482. The plaintiff in error insists, that where this fact appears of pleading, as in this case, it is matter of error to omit the certificate. We think the party has mistaken his remedy. The judgment in such case is right, and there is nothing to reverse. There may be good cause why the certificate is omitted by the court. If it were refused in a proper case, and the facts appeared in a bill of exceptions, we would correct it; but bare omission can be corrected only in the court where the judgment was rendered. Judgment affirmed.

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ROBERT M. LAMB v. THOMAS C. RICKETS.

Where a deed calls for an object on the bank of a stream, thence south, thence east, thence north to the bank of the stream, and with the course of the bank to the place of beginning, the stream, at low-water mark, is the boundary.

Where the owner of land is bounded by a stream, he owns to the center of the stream, subject to the easement of navigation, etc., but to calculate the quantity in a survey, no reference is had to what lies between low-water mark and the center of the stream.

THIS is a bill in chancery from Coshocton county.

The bill sets forth, in substance, that on April 13, 1837, a written agreement was entered into, under the hands and seals of the parties, by which the complainant bargained and sold to the respondent lot No. 216, in the town of Coshocton, with the improve-



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ments thereon, immediate possession, rents, etc. That, in consideration thereof, the respondent bargained and sold to the complainant the tract of land lying east of the town of Coshocton, and adjoining the out-lots, known as the Hamlin lot, containing forty-two acres, more or less; and also out-lots, Nos. 22 and 23, being the same lots deeded by \*Wm. Cantwel, to Joseph [312 Rickets, and supposed to contain ten acres.

That the said agreement contained a proviso, if the Hamlin lot, and the out-lots, jointly, should contain more than fifty-two acres, the excess was reserved to the respondent; that the complainant, Lamb, executed his deed, and delivered possession of lot No. 216, in pursuance of the agreement, on May 8, 1837; that Rickets, the respondent, conveyed the Hamlin lot, and described it as containing forty-one acres, and being the same tract deeded by James Moore and wife to James Calder; that the description in this deed is in these words: "Beginning at the south bank of the Tuscarawas river, where the line between the first and second quarters of the fifth township intersects the same, where there is an old dogwood, with a notch and blaze in it, and a number of shoots springing from the roots, from which a white oak, fifteen inches in diameter, bears south twenty-eight degrees, west fifteen links; thence south, with the division line, thence east, etc.; thence north, etc., seventy-two chains and ten links, to the south bank of the Tuscarawas river, from whence a maple, four inches in diameter, bears south thirty-six degrees, east eleven links; a forked maple bears south, etc., thence with the courses of the south bank of the Tuscarawas river to the place of beginning."

The bill also states, that the respondent, Rickets, refuses to convey the two out-lots, and prays for the specific execution of the contract.

The respondent, in his answer, admits his refusal to convey the two out-lots, and sets up, by way of defense, in substance, that before he conveyed the Hamlin lot, large accessions had been made to the southern shore of the Tuscarawas river, along where the line runs, on the bank, from the forked maple to the place of beginning, and claims the benefit of these alluvial formations to make up the quantity of fifty-two acres, which he obligated himself to convey, and which he claims is nearly, if not wholly, sufficient for that purpose.

\*MATHEWS and HUMRICKHOUSE, for complainant, cited [313

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*Stoner v. Freeman*, 6 Mass. 439; *Hopkins v. Kent*, 9 Ohio, 15; *Sibley v. Holden*, 10 Pick. 249; 4 Pet. Cond. 694; 7 N. H. 241; 17 Pick. 357; 3 Pick. 356; 10 Mass. 149; 11 Pick. 193; 5 N. H. 520; 10 Pet. Cond. 716; 3 Ohio, 495; 2 Ohio, 309; 6 Ohio, 507; 17 Mass. 289; 3 Sumn. 178, 179.

SPANGLER, for defendant, relied on *Lessee of McCulloch v. Aten*, 2 Ohio, 307; *Gavit v. Chambers et al.*, 3 Ohio, 495; *Benner's Lessee v. Platter et al.*, 6 Ohio, 504; *New Orleans v. The United States*, 10 Pet. 717; 4 Pick. 268; 2 N. H. 369.

WOOD, J. It is very clear if the Hamlin lot contained fifty-two acres, when conveyed to the complainant in exchange for lot No. 216, the contract is satisfied by *merger* in the deed, and the complainant has no rights to enforce in the case at bar.

It was the manifest intention of the parties, as arising upon the face of the agreement, that no more than the quantity, *fifty-two acres*, was, in any event, to be conveyed by the respondent, unless contained in the Hamlin lot; but it was supposed by the parties there was not so much in that tract, and the deficiency not being ascertained, the proviso was inserted in their agreement, "that if there should be more than fifty-two acres in the Hamlin lot and out-lots, the excess was reserved to the respondent."

It is admitted that if the line of the Hamlin lot, on its northern boundary, is extended so as to cover the *alluvial formation to low-water mark*, the complainant has his *fifty-two acres* in that lot. By a survey made under an order of court, the lot, without the *alluvion*, contains 42.68 acres; with it, 52.25.

It is a well-established principle that formations, by *slow and gradual accretion*, belong to the owner of land, when made by a *stream forming his boundary*, and opposite thereto; and whether 314] those slow and gradual accretions were those of the \*respondent, when he conveyed the Hamlin lot, depend entirely on the fact whether the Tuscarawas river was his boundary, where these deposits were made. This question must, therefore, be ascertained. The deed of Moore and wife to Joseph Rickets is the oldest deed, and the one on which both the parties rely, and it describes the tract by metes and bounds as follows: "Beginning on the *south bank* of the Tuscarawas river, where the line between the first and second quarters of said fifth township intersects the same, etc.; thence south, with the division line of the first and

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second quarters, etc.; thence east, etc.; thence north, etc.; *to the south bank* of the Tuscarawas river, from which a maple, four inches in diameter, bears south, etc.; thence, *with the courses of the south bank of the Tuscarawas river, to the beginning.*" As counsel suggest, in argument, it commences with the bank, returns to the bank, and thence, with the courses of the bank, to the beginning. Not from, to, or with the bank, as it was twenty-five or thirty years ago, but as it was when the Hamlin tract was conveyed to the complainant; to the bank, with it, and from it, as the lines of the survey must *now* be extended, so as to include the *alluvion* to low-water mark.

The counsel for the defendant contend that *from, to, and with the bank* of a stream, as here expressed, does not extend to low-water mark, but leaves a narrow strip between low-water mark and the break of the bank, not covered by the deed, to which the alluvion attaches, and therefore belongs to Moore, or the original owner. If so, it is not probable the parties had any such intention. The Tuscarawas, around the north end of the Hamlin lot, is a curve, and a curved line, with the course of the river, would be inconvenient in other respects, as well as by depriving Hamlin of access to the river, while the strip not conveyed, as it then was, if the counsel for the defendant is right in his conclusion; could have been of no use to any other person. We need not, however, elaborate this principle. It has been done by those who have gone before us, and, as we think, the rule, as there laid down, ought to be adhered to.

\*In the case of the Lessee of McCulloch v. Aten, cited by [315 counsel, 2 Ohio, 307, the court say: "When a deed calls for a corner standing on the bank of a creek, thence down said creek with the several meanders thereof, the boundary is the water's edge at low-water mark. In this case a white oak called for by the deeds was found on the ground, about four rods from the channel of the creek, and about one rod from the top of the bank."

This authority settles this case so far that it is clear the alluvion attaches to and forms a part of the Hamlin lot; but the west line of this tract of Hamlin divides the quarter township, and cuts off a part of this alluvion, which, it is admitted by counsel, does not belong to this tract; the quantity is 3.97 acres. The plaintiff's counsel claim, however, that the line of the Hamlin lot should be

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extended to the center of the river, and, computing the quantity of land between low-water mark and the center of the river, there is then more than sufficient to make up the number of acres called for by the agreement. In the case of *Gavit v. Chambers*, 3 Ohio, 495, it is said: "In Ohio, owners of land situated on the banks of navigable streams, running through the state, are also owners of the beds of the river to the middle of the stream, as at common law, subject only to the easement of navigation." This is undoubtedly correct; and in *Benner's Lessee v. Platter et al.*, 6 Ohio, 504, it is said a call for a stream, not navigable, is a call for the main branch of such stream, and the boundary is the middle of the stream. But, nevertheless, it is certain, in the computation of the number of acres in a survey, for that purpose, the stream, at low-water mark, is the boundary. This result requires of the respondent, to satisfy the terms of his agreement, to convey to the complainant, from the two out-lots, sufficient to make up the deficiency in the *alluvion*, and a decree may be so entered.

Decree for complainant.

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316] \*SARDIS BURCHARD v. PLINY HUBBARD, GEORGE F. WHITAKER, AND BENEDICT BROOKS.

A tax title is invalid when the land has been listed, forfeited, and sold, "as one hundred and twenty acres in the Whitaker reserve," there being one thousand two hundred and eighty acres in the reserve.

Where a person, without title, conveys by deed of warranty, and afterward receives title as trustee from the rightful owner, for the purpose of transmitting it to a bona fide purchaser, the doctrine of estoppel does not defeat the trust estate.

THIS was a bill in chancery from the county of Sandusky.

In November, 1822, a patent issued to Elizabeth Whitaker for 1,280 acres of land, being the "Whitaker reserve," in Sandusky county.

On June 3, 1823, Elizabeth Whitaker conveyed the entire reserve to George F. Whitaker, in fee; and on October 10, 1823, George F. conveyed in fee 190 acres, in which was included the land here in controversy, to Isaac Whitaker.

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On October 12, 1823, Isaac mortgaged his tract of 190 acres to James Whitaker, to secure the payment, on August 12, 1832, of \$400, with annual interest.

The taxes being unpaid in December, 1831, part of the land was sold at a tax sale to R. Dickinson, who received a tax deed. The auditor's deed recites a sale of 120 acres, and purports to convey "140 acres of land in the Whitaker reserve," without any other description. Shortly after his purchase, Dickinson agreed to hold the land for the benefit of Isaac, and reconvey to him upon reimbursement of the amount paid and expenses. But Dickinson, having some transactions by which, on settlement, he fell in debt to George F. Whitaker, transferred to George F. this tax title, by deed dated January 15, 1834, to be held upon the same terms as it had been by Dickinson.

\*In June, 1834, the complainant, Burchard, talked of purchasing the tract of 190 acres, and with a view to effect a sale of the property to satisfy the mortgage, and the tax incumbrance, and to secure the residue to the benefit of Isaac, James executed and deposited with his agent, Dickinson, a release of the mortgage, leaving a blank for the name of the grantees, to be filled up when an arrangement should be effected.

In March, 1835, Burchard agreed to purchase this tract of 190 acres, of George F. Whitaker, for \$800, with Dickinson's assent, but upon condition that the sale should be approved by James and Isaac. It was approved of, with the understanding that \$200 should be invested in wild lands for Isaac's benefit. Dickinson, being a lawyer, was consulted as to the best mode of transferring the title. He advised that, instead of conveying directly to the complainant Burchard, Isaac should make a deed to George F., in whom it was supposed the tax title was already vested, and that George F. Whitaker should then convey to Burchard, who would thus derive a perfect and unincumbered title.

On April 12, 1835, a deed to George F. was made by Isaac, and left in Dickinson's hands, by whom it was retained until July, 1835, when it, together with a release of the mortgage by James, was delivered to the complainant Burchard, and they were by him, on the 14th of August, handed over for record. On the 3d of November following, George F. Whitaker executed a deed, in fee, for the land, to the complainant.

But, in the meantime, George F. Whitaker, on July 15, 1834,

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had sold this same tract of land, for \$700, to the defendant, Pliny Hubbard, to whom, on June 24, 1835, having received the whole purchase money, he made a deed in fee for 150 acres off the west part of the 190 acres. This deed was recorded, June 26, 1835. In 1838, Hubbard sold and conveyed to Brooks.

**318]** \*Neither Hubbard nor Brooks had any actual notice of the transactions of George F. Whitaker with the complainant, but they were informed and believed that George F. had a perfect title. The complainant had no notice of the transaction between George F. and Hubbard.

This bill is filed by Burchard, setting forth his title, and praying to be quieted therein. The defendants, Hubbard and Brooks, answer, denying all notice of Burchard's interest, and claim that they are *bona fide* purchasers, and have an equity prior to the complainant's, for which they claim protection.

C. L. BOALT, for complainant:

Under the pleadings in this case, the defendant can not rely on being a *bona fide* purchaser, without notice for a full consideration. If the defendant would rely on this character to protect a disclosure, he should make his defense by plea, Story's Eq. Pl. 463, 465; and if he answers, at all, he must answer fully every allegation that bears upon the question of notice; and a general answer is not sufficient. Id 654.

The tax title, which is the only one that connects George F. with the legal estate, prior to the conveyance by George F. to Hubbard, is defective, and can not be relied on for any purpose.

There are several adjudged cases, in our reports, in point. 5 Ohio, 458; 2 Ohio, 287; 6 Ohio, 391; 10 Ohio, 556.

The subsequent passing of the title through George F. Whitaker, will not inure to invest Hubbard with any better title than George F. then had.

The law of *estoppel* could only apply between George F. and Hubbard, in a court of law. It could not be extended to the complainant. No one is bound by an *estoppel* who can not take advantage of it. It is mutual in its application. Here Hubbard and Burchard derived their titles from different sources. The assertion of title by George F. Whitaker was adverse to the interest of James and Isaac. They could not \*stand together. Neither is the complainant's conscience bound in equity. If the act of George F., in attempting to convey without title, could

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have any effect on him, it was equally a fraud on him as on Hubbard; and how can an equity arise against him out of such a state of facts?

In the course of transmitting this title to effect another object, it was passed through George F., but Hubbard was not affected by it, or misled as to George F.'s rights. The mischief which affected him was already done. Had he been injured by that act, he might have some reason to complain; but such was not the case.

Here George F. was made use of as a mere conductor, to transmit the title to another; and as dower will not attach in favor of the wife, where the estate is passed through the husband, and a mortgage taken back to secure the purchase money, on the completing a purchase, so, here, it will not inure to vest any better estate in the grantee than George F. had.

The complainant had the better equity in the estate, and Hubbard was chargeable with notice.

If Hubbard had no legal estate by virtue of the tax title, he can not rely on the plea of *bona fide* purchaser. If he had, he was chargeable with notice by the record, and by the adverse possession, or both. If chargeable with notice by the record, he must be taken to be advised of all they contain; but the records do not disclose the fact that George F. held the tax title as a lien for his advances only, and if that title is valid to convey a legal estate, he would still be without notice of the latent equity. This is not the case, however, in respect to his negligence to prosecute inquiries of the person in possession. As an inquiry, in that quarter, would have led to a knowledge of all the rights of Isaac and complainant, the notice will operate commensurate with the right, both as to the trust attaching to the tax title, and also as to the outstanding recorded title. We rely, also with confidence, on our objections to the tax title; and, in either case, if notice was conveyed, Hubbard will, himself, stand in no better position, in respect to the rights of the complainant than if the estate had passed through \*Hubbard, instead of George F. Such [320 being the case, as the trust had attached in favor of the complainant, from whom the consideration moved, before the deed was executed to George F., Hubbard would be held, in equity, subject to the same remedies with George F. In order for Hubbard, being himself chargeable with notice, to set up title by virtue of

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the deed from George F., he is compelled to take the position, that George himself was a *bona fide* purchaser for a full consideration. The notice that affected Hubbard, at the time of his purchase and advance of consideration, takes away all the merit which he might otherwise claim, in respect to his own conduct. It is such as places him along side of George F. himself, as a participator in his attempt to commit a fraud on the complainant, or, rather, he is seeking to avail himself of an advantage as the consequence of that fraud. But the complainant's superior equity must prevail. I can not understand how the doctrine of estoppel, as admitted in a court of law, can have any effect in a court of chancery, under circumstances like these. What equity is there, in Hubbard, to claim an estate that he purchased (and paid for) of a person who had no title, being chargeable with notice that the title to that estate was outstanding in a third person, of whom the complainant purchased it, and to whom he paid the consideration? The mere fact that it became convenient, afterward, in transmitting the title to the complainant, to pass it through the person of whom Hubbard purchased, can not affect the merits of the question, one way or the other.

This view of the case is strongly fortified, and we are willing to trust the decision of the case upon it.

We have the right of being substituted in the place of the holder of the mortgage, which was then a lien on the land, and which we have paid off.

Here, the mortgage being a subsisting lien when Hubbard purchased, he is no worse off than he was at the date of his purchase, if we, who have paid it off, are allowed to assert it.

It would be unjust to allow Hubbard to have the benefit of that payment, for he was chargeable with notice that it was a valid incumbrance on the land when he bought.

321] \*This equity is but the claim of a familiar principle in favor of the complainant.

PETER HITCHCOCK, on the same side:

In the consideration of the case I shall treat it as if the controversy was between Burchard, the complainant, and Hubbard, one of the defendants; for although the defendant, Brooks, has purchased of Hubbard and paid the consideration money for the land, he can not claim under his purchase any better right than was vested in his vendor. And it may be further remarked, that at the



time of his purchase all the title papers now given in evidence were of record, so that he had full notice of the state of the title.

Neither Hubbard nor Brooks have interposed the plea of *bona fide* purchaser, without notice; and if they had, such plea could not, under the circumstances of the case, have availed them. Neither do they rely upon such defense in their answer.

I take this to be an incontrovertible principle, that the purchaser of real or personal property acquires no greater interest in the property purchased than was vested in his vendor. If the vendor has no interest, the purchaser acquires none. In the case under consideration, we admit that Hubbard contracted with George F. Whitaker for the land in controversy, that he paid him for it, and received from him a deed of conveyance; but we insist that, by this purchase, he acquired no interest, either legal or equitable, in the land itself, because his vendor had no interest, or if he did acquire any interest, it was only the interest previously vested in George. By this purchase the interest of third persons could not be affected. Burchard has also paid for the land; and by this payment he acquired an equitable interest in the land, because he contracted with, and paid to, the rightful owner. Both parties have paid for the land, but there is this difference between them: Burchard paid to the rightful owner, Hubbard to a stranger.

\*This principle that the purchaser acquires no greater interest by his purchase than was vested in his vendee, is one which it is necessary to bear in mind in the further consideration of this case. In such further consideration I shall avoid, as much as possible, the repetition of the arguments urged by my associate counsel.

It will be seen that Dickson, in January, 1834, conveyed to George his tax title; in June, 1834, George contracted to sell 150 acres of the land to Hubbard; in March or April, 1835, Burchard purchased, and paid to and for the use of Isaac the purchase money, the entire 190 acres; in July, of the same year, George conveyed the land in controversy to Hubbard; in August, Isaac conveyed to George, and in November, George conveyed to Burchard.

Now the inquiry arises as to the interest which Hubbard acquired by his contract of June, 1834. He acquired an equitable claim to whatever interest George then had in the land. He certainly acquired no other equity; no equitable claim to any interest which Isaac might have. The interests of George, so far as he

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had any interest, and the interest of Isaac, were adverse one to the other. The only claim of George to the land was in virtue of a sale for taxes, while Isaac had an interest in fee simple, unless that interest was defeated by the tax sale. If this sale was valid, then Hubbard acquired an equity in the land, because George had title. But if this sale was void, then George had no title, and Hubbard acquired no equity in it, although he may have acquired a right of action against George upon the contract.

Payment having been made upon this contract, George, on June 24, 1835, conveyed by deed, with covenant of warranty, the 150 acres of land included in the contract to Hubbard; and this deed was recorded two days after its date. By this conveyance Hubbard acquired all the legal title of George to the land, as he had, by his contract, acquired all his equitable title. As we have before seen, this legal title was nothing but the tax title. If that was valid, then Hubbard by this conveyance became vested with a title [323] in fee simple to the land; but if it was invalid, he acquired no more interest by the deed than he did by the contract, that is, just no interest at all.

Before this conveyance, however, to wit, in March or April preceding, Burchard had become interested in the land by purchase, and payment of the purchase money to the rightful owner; that is, unless Isaac had been divested of his ownership by the tax sale. But, it may be said, that Hubbard knew nothing of this interest of Burchard. By an examination of the record of deeds of the county, he must have known the state of the title, and that George had no other title than that acquired by the tax sale. The deeds previously executed were all of record, and he was bound to take notice of them. Besides, Burchard was in possession, by his tenant, Isaac Whitaker. True, Hubbard, in his answer, says that George represented the person in possession to be his tenant. But he was not the person of whom to inquire; he should have inquired of the tenant himself.

Subsequently, in order to carry into effect the contract of Burchard, and to vest the legal title in him, the deed of April 12, 1835, was delivered to him, although made, upon its face, to George; and on the 3d of November following, George conveyed to Burchard. Should any suspicion of unfairness arise from the circumstance, that this deed bears date on April 12, 1835, and was not delivered until the August following; or, should it be suspected that

it was actually delivered at an earlier period than we say it was, these suspicions must be removed when the court see, as they will see upon inspection, that it was not acknowledged until the 10th of August. Before this acknowledgment it could not, under our statute, operate as a conveyance. Besides this, Dickinson, in his testimony, explains the reason why the deed was not sooner delivered. He says that the whole business would have been completed on the 12th of April, but on account of the absence of some person whose presence was necessary; and that he, having the charge of the business for \*James and Isaac, did not find [324 time to attend to its final completion until the August following.

How, then, stands the case in this aspect of it? Burchard has a legal title derived from Isaac, the rightful owner, through George. Hubbard, if he has any title, has a legal title derived from the sale for taxes. And here it must be noticed, that the titles of Isaac and Dickinson did, at no one time, center in George. They were always adverse. Before the title of Isaac was vested in George, he had parted with the title derived from Dickinson. In this state of the case, it is manifest that Burchard has a perfect legal title, unless that title is defeated by the tax sale. And this leads to the inquiry as to the validity of that sale.

Were we to look only at the deed from the auditor, it would seem to me that nothing could pass by that deed, on account of the uncertainty of the description. The court will see that the deed recites, that Dickinson had purchased 120 acres of land in the "Whitaker Reserve," in township 5, range 15. This is all the description we have of the land. Now, the Whitaker reserve contains 1,280 acres of land. Which of these 1,280 acres was forfeited—which part was sold—which part was conveyed? This deed, if available at all, would authorize the purchaser to claim as well in one part as another. There is that uncertainty about it, that the deed itself must be held to be void, unless some new rule is established.

Further, this deed is inoperative, because it purports to convey more land than was sold. The quantity sold was, according to the recital, 120 acres; the quantity conveyed is 140 acres. If this deed shall be held to convey anything, it is impossible for me to see by what rule of construction it shall be held to convey that part, or any portion of that part of the reserve, which had been conveyed to Isaac. There is nothing in it to point to that part. The land

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forfeited was not listed in his name, but in the name of his mother. The quantity listed is fifty acres less than what belonged to him; and there is nothing in the description designating his land.

325] \*But if the court can get over this difficultly, there is still another, growing out of the deed from Dickinson to George. In this deed, the land conveyed is described as being the land of Isaac, but is described as being sold to Dickinson on December 14, 1831; whereas, the land conveyed by the auditor's deed, which we have in evidence, was sold on the 12th day of December, and the deed executed on the 15th. There is, then, no evidence, except from the deed of Dickinson himself, that the land by him conveyed to George was ever sold for taxes.

Again, it will be found upon reference to the papers from the auditor's office, now on file, that there is the same uncertainty in the description of the land in the duplicate and list of sales, that there is in the auditor's deed. The only description is 150 or 140 acres in the Whitaker reserve. There is nothing, however, to show that this particular tract of land was ever in default for the non-payment of taxes; 140 acres was forfeited and sold in some part of the reserve, but in what part is not shown. Under the authority of the cases heretofore decided by this court, and referred to by my associate counsel, this sale must be held to be defective, if not absolutely void.

Such being the case, it follows that, inasmuch as the complainant has the legal title, and is in possession, he is entitled to a decree to quiet him in that possession.

I am here, however, met by the objection that, inasmuch as George conveyed to Burchard, with covenant of warranty, and, inasmuch as we claim under or through George, we are estopped from denying that he had title. It is a familiar principle, and one which I am not disposed to controvert, that where one man, having no title, makes a deed of conveyance to another with covenant of warranty, and subsequently acquires title, this after acquired title inures to the benefit of the purchaser, and the vendor, and those claiming under him, are estopped from saying he had no title. In such case, the right or title of the vendee commences, not from the date of his deed from the vendor, for by that he took 326] nothing, but from \*the date of the acquisition of title by the vendor. This estoppel works an interest in the land, and the vendee may, without impropriety, be said to have a title by estop-

pel. The object of this rule, is to do justice, and prevent multiplicity of suits. But it must be observed, that the principle or rule applies only in cases where the grantor has no title or interest in the thing granted, so that there is nothing upon which the deed can operate. If, however, there is any interest in the grantor, although defective, or although less than is granted, the deed will operate to convey this interest, and can not operate as an estoppel. Thus, if tenant for life convey in fee simple, with covenant of warranty, the estate for life passes. But if the grantor subsequently acquire the reversionary interest, this will not inure to the benefit of his vendee.

In speaking upon this subject, Chancellor Kent says, 4 Kent's Com. 98: "If any interest, however small, passes by a deed, it creates no estoppel. The deed which creates an estoppel to the party undertaking to convey or demise real estate, when he has nothing in the estate at the time of conveyance, passes an interest or title to the grantee or his assignee, by way of estoppel, from the moment the estate comes to the grantor." So it is said, in Co. Lit. 45, *a*, "whosoever any interest passeth from the party, there can be no estoppel against him; and so it was adjudged." Again Co. Lit. 47, *b*, it is said: "A., lessee for the life of B., makes a lease for years by deed indented, and after, purchases the reversion in fee. B. dieth. A. shall avoid his own lease; for he may confess and avoid the lease which took effect, in point of interest, and determined by the death of B. But if A. had nothing in the land, and made a lease for years, by deed indented, and after purchase the land, the lessor is as well concluded, as the lessee, to say that the lessor had nothing in the land." This doctrine is fully sustained in 3 Bac. Abr., tit. Leases, O.

Let us apply this principle to the case under consideration. If, at the time George F. conveyed to Hubbard, he had no interest, but afterward acquired a title, this would inure to the \*bene- [327 fit of Hubbard; and George, and those claiming under him, would be estopped to say he had nothing in the land, at the time of conveyance. As the deed would operate in no other way, it must operate by way of estoppel. But if George had any interest in the land, no matter how small, that interest would pass by the deed, and there could be no estoppel. He had an interest, such as it was, by the tax title, and this passed, although defective in form and substance; still, there was an interest.

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If I am right in this position, there is an end to the case. But if the court should be of opinion that this tax title was void, and that the deed from Dickinson, of January, 1834, conveyed no interest to George, still I insist that the equity of the case is with the complainant, and he is entitled to a decree.

If the conveyance of Dickinson vested in George no interest in the land, then, in July, 1834, when he contracted to sell to Hubbard, he had no interest, and Hubbard acquired none. Neither did the conveyance of George to Hubbard, of June 24, 1835, vest any interest in Hubbard. Until and after this time the title, in fee simple, was in Isaac, subject to the mortgage to James. Hubbard, by his contract, acquired no equity in the land; by his deed he acquired no legal interest in it. It must be so unless the court should hold that a stranger, by contracting to sell my land, confers upon his vendee an equity in that land, or, by conveying it, vests in the vendee a legal title.

Previous to the date of the deed of George to Hubbard, Burchard had acquired a perfect equity in the land, by purchasing the same, and paying to and for the use of the rightful owner the purchase money. At any moment he could, by a proceeding in chancery, have compelled a conveyance from Isaac. In fact, Isaac was his trustee, holding for him the naked, legal title. This, then, was the situation of the respective parties. The legal title was in Isaac, the equity in Burchard, and neither George nor Hubbard had any claim, either in law or equity, unless derived from the sale for taxes.

328] \*Thus the matter remained until August 10, 1835, when the deed of the 12th of April, of the same year, was perfected by acknowledgment and delivery.

I admit, in the view now taken of the case, if this deed had been delivered to George with a view of vesting in him the ownership of the land, or if the design had been to vest the title in fee simple absolutely and unconditionally in him, or if, by the delivery of this deed, he had become the owner of the property, both in law and equity, then the title by him acquired would have inured to the benefit of Hubbard; and George, and those claiming under him, would be estopped to say he had no title on the 24th of June, when he conveyed to Hubbard. Hubbard's title, however, would not have commenced with the date of his deed, but at the time George acquired title. The title would, in fact, have

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been cast upon Hubbard by the operation of law. But it would be absurd to suppose that any greater interest could vest in Hubbard, by this estoppel, than was vested in George by the deed of Isaac.

What, then, was this interest? We have already seen that Isaac had nothing in the land but the naked legal title, which he held in trust for Burchard, in whom was the equity. This naked legal interest, then, was all he could convey, and all George could take by the conveyance, he knowing, as the case shows he did know, all the facts. And by this conveyance he became, as his grantor had been before, the trustee of Burchard, holding the legal title for him. The fact that the deed was absolute upon its face could make no difference as to him. The testimony of Dickinson shows conclusively that the conveyance was made to George, not to vest the property in him, but for the purpose of transmitting the title through him to Burchard. George had paid nothing for the land, and had no claim to it, derived from Isaac. Upon this subject there can be no doubt, if Dickinson tells the truth. It was the intention that George should take the naked legal title alone, in trust for Burchard, who had the equity. Such was the understanding of all concerned. This statement of Dickinson is corroborated by the fact that this deed never was, in truth, delivered to George, but was delivered to Burchard, [329 the equitable owner of the land. Under this state of facts, had the title remained in George, after the delivery of this deed, and had he refused to convey to Burchard, a court of equity would have compelled him, on the ground that he was a mere trustee. George, then, did not acquire such a title as would inure to the benefit of Hubbard, and Burchard can not be estopped from showing the real nature of the whole transaction. If this title could inure at all to Hubbard, it would only inure to him as it existed in George, and he must hold, as George did, the mere naked legal title in trust for Burchard.

I admit that if, while the title was thus vested in George, Hubbard had taken a conveyance from him, without notice, either actual or constructive, of Burchard's equity, he would have held the land. In such state of things, however, the question would arise, whether the actual possession of Burchard, by his tenant, was not sufficient notice. But such is not the state of the case. The conveyance of George, to Hubbard, was before George acquired even

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this naked legal title, and before he had any interest; therefore the doctrine of notice has no application. Situated as this case is, to hold that a title inured to Hubbard in consequence of the conveyance of Isaac to George, and that Burchard was estopped, would be to apply a principle, which was intended for the furtherance of justice, to defeat justice.

The mode of transmitting title in this case was, it may be admitted, somewhat singular, but it was the mode advised by Dickinson, a lawyer by profession, acting as the agent of Isaac, and the mutual friend of the parties. It was probably adopted in consequence of the circumstance that the tax title had before been conveyed by Dickinson to George, with an understanding that he should be indemnified when the property should be sold, and it does not seem to have been known to any of the parties that George had conveyed to Hubbard, except to George himself.

Should it be objected that, inasmuch as this deed was absolute upon its face, we have no right, under the statute of frauds, 330] \*to introduce parol evidence to prove the trust, I reply that it is a clear case of resulting trust, which may always be explained by parol, the statute notwithstanding. Burchard actually paid the money for the land, and paid it to and for the use of the rightful owner, and in consequence of this payment the conveyance was made, not to Burchard, but to George; and in consequence of the previous payment of the money a trust resulted. It does not differ from the common case of the payment of money for land, by one individual who takes the deed in the name of another, in which case there is always a resulting trust.

Under all these circumstances it seems to me to be clear that the complainant has a perfect equity in this land, while the defendant has no equity at all. If he has any interest at all, it is the mere naked legal title which he holds as the trustee of Burchard. He has no equity in the land, because, although he has paid a price for it, that price was paid to a stranger, not to the rightful owner. And if the court should hold that the title was in the defendants, or either of them, Isaac Whitaker is entirely cheated out of his land. For, upon such holding, it follows that the consideration for which Burchard paid his money, will have failed, and the money paid may be recovered back.

It may be thought that it will be equally hard for Hubbard should it be held that he had no title. It is true he also has paid



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his money, but he paid it with his eyes open. The state of the title appeared upon the records, and these records showed that his vendor had no other than the tax title. This he acquired, and nothing more. No other title, not even the naked legal title, would ever have been conveyed to Isaac, but for the payment made by Burchard. Hubbard, if he loses anything, loses it, not for any default, deception, or misconduct of the complainant, but on account of his own negligence. Besides, it must be remembered that he has received back \$300 of the purchase money, so that, at the worst, he is but \$400 out of pocket, which he may recover in an action upon the covenants of his deed, \*against George, the [331 man in whom he trusted and confided. He can be placed in no worse situation than he would have been had Burchard not purchased the land, for, in that event, he must have rested entirely upon his tax title.

The defendant, Brooks, purchased in 1838, long after all the deeds of conveyance, prior in time to his, had been placed on record. Of course he must be held to have had notice of the exact state of the title, and can be in no better situation than Hubbard.

Upon the whole case, it seems to me that the plaintiff is entitled to a decree, both upon the ground that he has the legal title, and is in possession, and upon the ground that he alone, of all the parties, has any equity in the land.

The reporter was furnished with no argument for the defendants.

**BIRCHARD, J.** The first question in this case grows out of a tax sale, and the decision of it will settle the merits of this controversy.

A tax deed was the only title held by George F. Whitaker when he conveyed to Hubbard, and the only interest in the land, which Hubbard acquired from him, was the tax title. Unless it was valid, no legal estate was conveyed to Hubbard, and the respondents have no rights except such as flow from the covenants contained in George F. Whitaker's deed. Whether these covenants operate to their benefit, so as to secure a title by reason of the deed subsequently made to George F. Whitaker, will be considered hereafter. The tax deed recites a sale of "120 acres in the Whitaker reserve. in township five, range fifteen." The whole reserve

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contained 1,280 acres. The deed does not inform us what part of the tract of 1,280 acres was delinquent, forfeited, or sold. And, if it was available, it would entitle the grantee to claim as well one portion of the tract as any other. It also recites a sale 332] \*of 120 acres, and purports to convey 140 acres.

The lands were listed in the name of Elizabeth Whitaker. The portion of the tract in question had been previously conveyed to Isaac Whitaker. How do we know that it was Isaac's portion of the tract, and not the part belonging to Elizabeth, which was sold? Certainly not from anything connected with the tax sale. The defects run through the proceedings in the auditors's office, and the tax title may be laid out of view, so far as its validity is in question. The cases cited by complainant, in 2 Ohio, 287; 5 Ohio, 458; 6 Ohio, 391, and 10 Ohio, 556, are in point.

Whether the subsequent passing of the legal title, through George F. Whitaker, will inure to the benefit of Hubbard, by reason of the covenants contained in Whitaker's deed, is the material and remaining question in the case. It will be observed that a mere naked legal title was all that ever passed through him. Burchard was the purchaser, and the title was conveyed to George F. Whitaker, as a matter of convenience. Taking the title, then, as between the two, the law constituted George F. a mere trustee of the naked legal title. A trust resulted to Burchard, whose money was paid to the *bona fide* owner. Had George F. Whitaker acquired for himself the legal and equitable title, he would, by reason of the warranty contained in his deed, have been estopped at law from denying the title of Hubbard, and, in chancery, his conveyance to Hubbard would have been held binding on his conscience.

We are asked to extend and apply this rule, as against the complainant. To do so, in the state of facts here existing, would be pushing it beyond reason. The equity of the complainant is equal to that of the respondents. He had no notice of their rights; his purchase did the respondents no harm; it did not mislead them. The deed, in fact, was not delivered to George F. Whitaker, but went into the hands of Dickinson, the agent and attorney of the complainant, who received it, and delivered it to the complainant, by whom it was put on record. If the doctrine 333] of estoppel could apply, it would vest \*no better title in

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Hubbard than George F. Whitaker himself acquired, that is, a trust estate.

In equity, he who is prior in time, other things being equal, hath the better right. Tried by this rule, complainant has the better equity in the lands. He purchased of the rightful owner, and paid his money. Hubbard bought of a stranger to the title. His payments were completed on June 24, 1835, at which time he took his deed from a stranger, who had nothing but a void tax title. This created no equity to the lands then owned by Isaac Whitaker. Before this time, complainant had become interested in the land by purchase, and payment of the money to Isaac, the real owner.

True, the deed from Isaac to George F. Whitaker bears date April 12, 1835, but it was not delivered until the August following. The acknowledgment bears date the 10th of August, and Hubbard, in his answer, says he had no knowledge of it. Hubbard's equity in the land, if he have any, can only date from the time George F. Whitaker received a legal title. It commenced with the delivery of Isaac's deed to George F. Whitaker; not with the delivery of George's deed to Hubbard. Before this, Burchard had acquired an equity which chancery would have enforced as against Isaac, the real owner. And it would be strange, if Isaac's subsequent deed, given without consideration on the part of George F., could, by operation of law, vest a title that would defeat him.

Is it doubted, if George F. had refused to convey, under these circumstances, that equity would have compelled him? He having made such conveyance, it must be held operative, and Burchard's equity being prior in time, his title should be quieted.

Decree for complainant.

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\*ADAM MOORE v. THE LESSEE OF ISAAC G. BURNET. [334

The legal title of a trustee under a deed of trust, with a power to sell for the payment of the debts of the cestui que trust, is not divested by the discharge of the debts, but the trustee may maintain ejectment.

THIS is a writ of error to the Supreme Court of Hamilton county.

The plaintiff, in the trial below, offered in evidence as the foundation of his recovery, a deed for the land in question, bearing date November 18, 1826, from William H. Harrison and wife, Jacob Burnet and wife, and Lewis Whiteman and wife, to Isaac G. Burnet. This deed contained the following recital: "Whereas, the parties of the first part are indebted to the estate of Dr. Elias Boudinot, late of the State of New Jersey, deceased, in the sum of about \$4,000, on account of the purchase of the premises hereinafter mentioned, and have agreed to convey the said premises to the party of the second part, with power to sell and convey the same and apply the proceeds to the payment of the said debt, the amount of which will be ascertained by reference to a bond now in the hands of the executors of the said Elias, and which is considered as a lien on said land. Now this indenture witnesseth, that the parties of the first part, for and in consideration of the premises, and for the further consideration of one dollar to them in hand, well and truly paid, etc., have granted, bargained, and sold, etc.

The deed then proceeds, in the usual form, with covenants of warranty. Both parties claiming under William H. Harrison, there was no question raised by either party as to his title. The defendant claimed the land in controversy by virtue of a deed made by the sheriff of Hamilton county, on a sale of the premises as the property of William H. Harrison, upon a decree 335] against him in 1828; under which sale, the defendant \*went into possession. The defendant then offered evidence tending to show that the debt, mentioned in the deed to Isaac G. Burnet, was paid before the sale under which defendant claimed, and asked the court to charge the jury that if they were satisfied that said debt was so paid, the plaintiff's title was extinguished, and he had no right to recover. The court refused to charge as requested, but charged that, if the debt was paid it would not defeat the plaintiff's title. To this opinion of the court exceptions were taken, and they are now assigned for error.

CHARLES FOX, for plaintiff in error:

It will be observed that Isaac G. Burnet never had any beneficial interest in this land. It was merely conveyed to him to secure payment of the debt due to Boudinot's estate, and the conveyance, it is said, gave him a power to sell if he should think proper to exercise it, in order more fully to secure the payment

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of the debt. This instrument, as I understand it, is nothing but a mortgage; and if so, it will not be pretended the judgment is correct. Now, to constitute a valid mortgage, there must be a person capable of granting, a person capable of receiving the estate, an estate to be conveyed, and a debt to be secured. But, I insist, it makes no difference, whether the creditor, or a third person, is the mortgagee. The object of the mortgage is to secure the debt, and whether the title is vested in the creditor or some third person, for his benefit, is immaterial. It may be to the creditor, or to one of many creditors, for the benefit of himself and others. 7 Cow. 13; 13 Wend. 485.

The case in 13 Wend. was a case where a mortgage was made and conditioned to be void if certain legacies were paid. These legacies were not due to the mortgagee.

The mortgage, in 7 Cowen, 13, was to secure payment of a debt, on which the mortgagees and two other persons were liable.

\*In 15 Johns. 205, and 3 Wend. 209, the deed was absolute on its face, but a written defeasance showed the intention of the parties was to secure payment of a debt; therefore, the deed was held to be a mortgage. So in 15 Johns. 555.

That a deed absolute on the face of it may be shown by parol, to have been intended only to secure the payment of a sum of money, and therefore is only a mortgage, is now well settled. 1 Cow. 122; 18 Johns. 7, 110.

The essence of a mortgage, I suppose to be the security for the payment of a debt, or for the performance of some other lawful act. It is immaterial whether it is the grantor's debt, or the debt of some other person, or whether it is to pay a debt due to the grantee or some other person, or for the performance of an act beneficial to the mortgagee or some other person.

Now, in the present case, the object of the conveyance is declared in the first part of the deed, and that object is to secure payment of a debt. We have, then, the existence of a debt admitted; the object declared to secure the debt; and the deed also contains the power to sell the premises, to pay the debt. Surely the deed does not cease to be a mortgage, because a power of sale is contained in the deed. 18 Ves. Ch. 343. All mortgages contain that power in New York, and a statutory foreclosure is provided for under such power, without going into chancery. 1 Johns. Ch. 50; 2 Cow. 195. If the whole of this debt had been

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paid, would it be pretended that the power to sell would not have ceased from that time? The power to sell was only a means provided for enforcing payment: and if the object of the parties (the payment of the debt) had been accomplished, it is very clear the power to sell ceased at that moment. The addition of such a power is contained in all the modern English mortgages. 3 Pow. Mort. 1122, contains a form of mortgage with power of sale. 1 Pow. Mort. 110, 9 *a*, note.

The fact, then, that this deed authorizes Burnet to sell to pay 337] the debt, can not affect the matter one way or another; \*and leaving the power to sell out of the question, we have a simple conveyance to secure the payment of a debt; and the amount is to be ascertained by reference to the bond referred to. If this is not a mortgage I do not know what is. It is not necessary that there should be any defeasance, in fact, to constitute a mortgage. 2 Sumn. 487.

The case of *Stratton v. Warren, Sabin, and others*, 9 Ohio, 30, has no application, because, in that case, there was no evidence of any debt due.

Nor does the case of *Baird v. Kirtland et al.*, 8 Ohio, 23, affect this case, because the nature of the transaction did not appear on the deed, nor was the money paid, although the court say in that case the transaction would only amount to a mortgage in equity.

If, then, this is a mortgage, Harrison had an interest which could be taken and sold on execution, and the purchaser took subject to the mortgage. 5 Paige's Ch. 9; 10 Ohio, 71; 3 Ohio, 21. And it is now well settled that payment of a mortgage debt is a discharge of the mortgage, and that a reconveyance is unnecessary. But the fact of payment is, of itself, in effect, a transfer of the title. 1 Cow. 122; 18 Johns. 113; 11 Ib. 534; 1 Marsh. 53; 1 J. J. Marsh. 257; 8 Ohio, 23; 1 Pow. on Mort. 110, note; 3 Mason, 520.

So a tender, of the money due, is held to divest the mortgage of the legal title. 18 Johns. 114, 115.

It is said, however, this is a deed of trust, and therefore the title was not in Harrison. In one sense, every mortgage is a deed of trust; but if it is intended to say this is a technical deed of trust, I deny that it can be so construed. There is no trust declared in the deed itself, and if any trust exists, it is only by implication, and such a trust exists in all mortgages. If I transfer, by deed,

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absolute on its face, although really to secure payment of a debt, undoubtedly the mortgagee may be considered a trustee. But we have seen that it makes no difference as to the character of the instrument, whether the deed, absolute on its face, is turned into a mortgage by parol, \*or by a written defeasance. The fact [338 of its being to secure a debt, and that the debt is paid, may be shown at law or in equity, and when shown, defeats the title of the mortgagee. 1 Cow. 122; 18 Johns. 7, 110.

I claim, therefore :

1. That, as between Moore and Harrison, we showed a judgment, execution, and sale, and hence Harrison could not say we had no title, as against him.

2. That the deed from Harrison to Burnet is, in truth and in fact, a mortgage, and not a deed of trust.

3. That if it could be considered a deed of trust, after the payment of the debt, it was a trust for the benefit of the grantor, and therefore void, and could not operate against the levy made after such payment, and that the court ought so to have instructed the jury; but not having done so, the judgment ought to be reversed.

WRIGHT, COFFIN & MINER, for defendant in error :

The argument, on the part of the plaintiff in error, is directly to establish the fact that the deed to the lessor of the plaintiff was but a mortgage, and that being such, the payment of the money extinguished the mortgagee's right, and reinvested him with the estate. This court, in *St. Clair v. Morris*, 9 Ohio, 15, say that a mortgage in fee, is, in reality, a fee simple conditional, which is as large and ample estate as a fee simple absolute, though it may not be so durable; and a transfer of such an estate can not be affected by a mere assignment of the debt. It would seem, then, that if the estate was so ample that a transfer of the debt, which is claimed to be the principal ingredient of the mortgage, will not transfer the estate, that payment, or any other matter, evidenced by less solemn act than the mortgage, can not be held to effect that end. But a mortgagor, before condition forfeited, is only regarded the owner of the mortgaged premises, against all but the mortgagee; and if his right of possession be levied upon and sold, he only acquires that right, and upon it can not defend himself in possession against the mortgagee. 2 Ohio, \*224, [339 and mortgaged lands, in the hands of the mortgagee, can not "be

sold on execution until the equity of redemption is foreclosed." Hill v. West, 8 Ohio, 224.

The general assembly, in 1836 (Swan's Stat. 270), finding doubts and inconvenience to exist as to making releases of mortgaged property, provided, for the first time in this state, that the entry of satisfaction, on the mortgage, or on the record, should "operate, and be taken, to release the said mortgage to whoever might be entitled to a release." In the case before the court, no evidence exists on the deed, or upon the record of it, of any satisfaction. The legislative provision is a good one. This court will not extend it. Before this act, we contend the estate, vested in the mortgagee, could only be legally divested, and vested in the mortgagor, by deed of release, an instrument of equal dignity with the conveyance.

It is not necessary, we think, to inquire how far courts of equity may go, to ascertain whether a conveyance, absolute on its face, was, in fact, a mortgage, because our case bears no analogy to such.

Our title is a deed of trust, absolute on its face, and in fact. It is true, the recital in the deed, in setting forth the reason for the conveyance, speaks of a debt due by the grantors to a third person, the intention of paying that debt, and to confer power to sell the estate conveyed, to effect that end; but, having recited these facts, it conveys the land in fee absolute, without any condition of defeasance, in form, on its face, or, in fact, in any way. If, then, it were to be held, which we think it can not be, that the performance, in fact, of the condition of a fee conditional, saves the estate from becoming absolute, and *ipso facto*, worked a reconveyance, still that is not our case, simply because there is no condition of defeasance connected with our deed, evidenced by it, or otherwise. If, also, in such fees conditional, the grantor is held the owner until the condition of the grant which is to render it absolute has happened, and, until then, may be sold as his, yet, again, that is not this case. We have now to do with the grant actually made, not with any other the parties ought, or may have intended, to [340] make. \*If the deed does not convey the estate the parties intended, this court can not, in this way, correct it, and make it conform to their intention. Can any one say this deed is a mortgage in form or fact? We think not. And though a mortgage may, to some extent, be regarded as a trust, it does not follow that a deed of trust proper, as familiar to the law as a mortgage, is to



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be taken and held to be a mortgage, to let in a technical adverse claimant.

In any view in which we may look at this case, it appears clear that the court did not err in either of the particulars named, even if the court suppose the evidence offered received, which does not appear; and if rejected, this court can not notice that, because no exception appears to have been taken to that. The practice in New York is peculiar to the laws of that state, and not well adapted to our law on this subject.

READ, J. William H. Harrison, Jacob Burnet, and Lewis Whiteman had, by deed, with full warranty, conveyed this property to Isaac G. Burnet, with power to sell and pay to Elias Boudinot \$4,000.

This deed places the legal title in Isaac G. Burnet, the lessor of the plaintiff in ejectment. Whilst the legal title was thus in Isaac G. Burnet, one-third of the estate was sold under a decree, as the property of William H. Harrison. The purchaser then, of course, takes but Harrison's interest, whatever it may be.

Having but the equity, at most, by the sheriff's deed, he is here in court, urging it as a bar to a recovery in an action of ejectment.

Counsel perceive that this is an end of their case, and seek to avoid it, by contending that the payment of the \$4,000 to Boudinot, *ipso facto*, destroyed the deed to Isaac G. Burnet, and reinvested the *cestui que trust*, William H. Harrison, with the legal title, and that it has passed to the purchaser under the decree.

To make out this conclusion, it is contended that this is a case of a satisfied mortgage.

\*To place it upon the most favorable footing for the defend- [34] ant in ejectment, it is not a satisfied mortgage, but a satisfied trust. A *cestui que trust* having the legal title, may maintain ejectment after the trust is satisfied. Hopkins et al. v. Stephens et al., 2 Rand. 422; Hopkins et al. v. Ward et al., 6 Munf. 38. From anything that appears in the record, Isaac G. Burnet may be more than a mere naked trustee; he may have an interest.

There is nothing in this deed to distinguish it from an ordinary deed of trust, where a conveyance of the trustee to the *cestui que trust* is necessary to reinvest him with the legal title. It is not at all the case of a mortgage, because a mortgage is a mere incident

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to a debt which it is given to secure, and never divests the legal title of the mortgagor as to the rest of the world, nor even as to the mortgagee, except to allow him to obtain possession and apply the rents and profits to satisfy his debt. A mortgage lives and dies with the debt; satisfaction destroys it.

But such is not this case. The whole legal title passed in trust to the lessor of the plaintiff, where it remains, and entitles him to recover in ejectment.

The court did not err in their charge to the jury.

Judgment affirmed.

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**342] \*EPAPHRO SEYMOUR v. HEZEKIAH KING ET AL.**

A sheriff's return that he could find no goods or chattels, lands or tenements of the principal debtor, unincumbered by mortgage, is sufficient to authorize suit on an injunction bond.

THIS is a motion for a new trial, from the county of Lake.

LANE, C. J. This was a suit on a bond given to obtain an injunction in a suit in chancery, which has been dissolved. It was reserved to determine whether the return of the sheriff, of the execution against the principal, is sufficient to give the action under the statute.

The return is in these words, "I have made due and diligent search for goods and chattels, lands and tenements, belonging to the defendant, and find none in my bailiwick unincumbered by mortgage, whereon to levy this execution, and the same is returned wholly unsatisfied."

This seems to us sufficient. The sheriff's return is to be taken as good between these parties, and can not be falsified as between them by other evidence; for he is the officer of the law, and the creditor need look to no other source of information than his official return. If it be false, he may be sued for false return, and its falsity may be shown against him. Perhaps, too, these defendants have such an interest in that return that they may correct it in that court by motion. But here, it must be taken as it stands, and we can look no further.

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It showed the principal debtor had no property except what is incumbered by mortgages. What liens, or on what property is not set forth. Now an execution may be levied on the interest of a mortgagor in possession of mortgaged lands, because it is a possessory interest at least, which is a legal estate. But since it is to be appraised at full price, without regard to the mortgage, which remains an incumbrance on the lands, and may be asserted against the purchaser, it is plain that no fair sale can be made of lands so situated; and we have held at this term that it affords a [343] sound reason for abandoning such a levy. *Commercial Bank of Lake Erie v. Western Reserve Bank et al.*

A court of equity is the only proper tribunal to adjust the interests of all parties.

The most which can be made to favor the defendants from this return is, that there might have been made a levy, which the plaintiff was not bound to pursue, and from which he properly could obtain no satisfaction of his debt.

It seems to us the return affords the plaintiff ample ground to commence this suit; that under such circumstances of mortgaged lands, the surety may protect himself by paying the debt and claiming the benefit of the judgment by way of substitution.

Motion for new trial overruled. Judgment for plaintiff.

HITCHCOCK & WILDER, for plaintiff.

WADE & HURLBURT, for defendants.

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WILLIAM MELICK AND WIFE v. ABRAM DARLING.

To create a case of election there must be a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both, that one should be a substitute for the other.

The party who is to take has a choice, but he can not enjoy the benefits of both.

THIS is a bill in chancery, from the county of Knox.

The object of the bill is to compel the defendant, Abram Darling, to relinquish his claim to the southwest quarter of section

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**344]** 7, township 5, and range 10, in the county of \*Knox, or to surrender his rights under the will of William Darling.

At the date of the will, the testator and the defendant were tenants in common of the quarter section, the patent having issued to both. This community of interest existed at the time of the death of the testator.

The testator devises: 1. To his two grandsons, Patrick M. Darling and Wm. Darling, the farm or plantation where he then lived, containing 525 acres, being in township number six, etc., to be equally divided between them in *quantity* and *quality*, when they arrive at the age of twenty-one years. In case of the death of either of the devisees without legal heirs, the property is to revert to the survivor; and if neither live to have legal heirs, the plantation is devised to his grandson, Adam H. Darling; and if the last-named devisee died without a legal heir, the farm to be equally divided among the surviving sons of the testator's son, Abram Darling; but if he had no sons, then to be equally divided among the surviving daughters of Abram Darling, etc. 2. The testator devises to his grandson, William D. Beatty, his half of the quarter section, entered in the name of William Darling and William Beatty, lying and being in township 5, range 10. Also, he gives to his grandson, Jeremiah Beatty, the southwest quarter of section 7, in township 5, and range 10. Also, to his two grandsons, Adam D. Darling and William P. Darling, the northwest quarter of section 7, in township 5, and range 10.

A tract of land in Virginia is also given to the testator's son and daughter, Abram and Jane; and his personal property directed to be equally divided among his grandchildren, after the payment of his debts.

HOSMER CURTIS, for complainant:

The first question between us turns upon the right construction **345]** to be given to the will. That clause through which \*complainant, William Melick, derives title, is the devise to Jeremiah Beatty, and is expressed in these words:

"I also give unto my grandson, Jeremiah Beatty, the southwest quarter of section 7, township 5, of range 10."

Did the testator intend, by this clause, to convey a fee simple?

We claim that he did; and that this interpretation is fairly inferable: 1. From the sense in which he uses the word "give," as

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applied to the devises to his grandsons, Patrick Morgan and William Darling, in the first part of the will. Other clauses of the will clearly show that the testator understood these words as conveying a fee. 2. The situation and circumstances of the testator, and the circumstances of his property, go to confirm this inference. There is nothing in the will tending to show that the testator supposed he was leaving any part of his estate undisposed of by his will.

On this question we refer the court to *Smith v. Berry et al.*, 8 Ohio, 365. This authority we think decisive of the question.

A second question made by defendant is this: Did the testator intend to invest Jeremiah Beatty with the whole, or only the undivided half of the quarter section in question?

The defendants assume the latter alternative of this question; and, as I believe, principally rely upon the circumstance that this quarter section was the joint purchase, from the United States, of the testator in his lifetime, and the defendant, Abram Darling, his son; and the want of any proof of a sale and conveyance by defendant to the testator. The facts are not disputed. But we claim for plaintiffs that the clear expressions used by the testator comprehend the entire quarter section, and not the undivided half. He could not have found language more definite to this point. And that he perfectly comprehended the difference between the whole interest and the half, is apparent on the face of the instrument. Because, in the sentence immediately preceding the gift to Jeremiah, the distinction is taken in a devise to his grandson, William Beatty; wherein, in express terms, he gives to William, to use *his own language*, "my half of the quarter section [346 entered in the names of William Darling and William Beatty," etc. The evidence also shows this was an undivided half. The patent for the land in question, adduced by defendant in evidence, shows that this quarter was also the joint entry of the testator and Abram Darling. This fact must have been fully in the mind of the testator at the same time. And what sound reason can be urged why he did not, in the devise to Jeremiah, use the same restrictive language as in the devise to William, if he contemplated the gift to him of the same limited interest?

The fair inference, as we believe, is, that by some previous transaction or present understanding between the testator and Abram Darling, the former, at the time of making his will, sup-

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posed himself fully authorized to donate the entire quarter section to this grandson, and that he intended to do so. And this inference is strengthened by the testator's circumstances, and other parts of the will. It seems the testator had but two children, a son and a daughter, and, excepting his Virginia land, which he gave to these children in equal interests, and a limited estate to Abram Darling, he gives all his real estate to certain grandchildren named. In looking over the several devises of his real property, it will thus be found that his bestowments upon Abram Darling's family, besides the Virginia land, embraces his home farm of 525 acres, and an entire quarter section of 160 acres, making 685 acres of land to his male progeny, while, admitting our construction of the will, his daughter's family were receiving no more than one and a half quarter section of land, equal to 240 acres. But if their construction of the will prevails, this quantity is reduced to 160 acres.

A third question arising in this case is, whether (admitting the testator intended by the will to give the entire quarter section), in point of law, anything passed under the will to Jeremiah Beatty but the undivided half of the quarter actually owned by the testator at his death?

A solution of this question involves the well-known doctrine of **347** election. 2 Story's Eq. 335, 336, secs. 1075, 1076; Id. \*337, 338, note 3; Id. 357, sec. 1096. For the plaintiff, we claim, under this head, that Abram Darling himself derived, under the same will, the undivided half, in fee, of the testator's Virginia land—of what value does not appear in evidence—and that he has also received the use and occupancy of the home farm, 525 acres of land, and is still entitled thereto, until the youngest of his children, then, or afterward born, shall marry or come to the age of twenty-one years, for the purpose of raising his children. This benefit to him, under the will, has been worth \$500 a year, as established by B. Butler's deposition. So that having used and occupied this property already a period of some seventeen years or upward, he has derived the full amount of \$8,500. And we insist, that, by availing himself of these large benefits under the will, Abram Darling has made his election to take under the will, and it does not now lie in his mouth to set up a right to this quarter section, or any part of it, which goes to defeat the will. We re-

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fer, under this head, to 2 Story's Eq. 358, sec. 1097; Tibbits v. Tibbits, 19 Ves. 662; 1 Swanst. Ch. 382, note.

But if it be considered by the court, that he has still the right to make an election, and chooses to adhere to his legal rights in the quarter section in controversy, then it belongs to equity to exact from him all the benefits he has, or may be entitled to under the will, and to apply them to make good to complainants the full value of the half quarter in controversy. 2 Story's Eq. 345, secs. 1083, 1084; Lewis v. King, Swanst. Ch. 438; note 1, Id. 441.

The defendant has further insisted that the devise to Abram Darling of the home farm, to raise children, etc., was not a pecuniary benefit to him; but in that he was only made a kind of trustee for his children's benefit.

By the laws of the land, a father is bound to provide proper sustenance for his own children; and whoever supplies him with the means of performing this duty, necessarily benefits the father to the extent of the means supplied. It is as if the will had given a man a certain fund to maintain and support his wife, himself, or to provide himself with a \*mansion. The words relied upon [348 are no more than the benevolent expressions of a giver, which often are communicated with the gift, but which are never supposed to restrict or control the interest of the donee in the gift.

R. C. HURD, with KINNEY and McNULTY, for defendants:

In determining questions of intention arising upon wills generally, the court is governed by the slightest preponderance of probability. Recognizing in every man a right to dispose of his own property, by will, according to his own good pleasure, it is content, notwithstanding it may have doubts—doubts almost invincible—if it can say such was probably the meaning of the testator. .

But the rule is different where the question is, whether the testator intended to devise property not his own.

And to this effect are the authorities. "It must be clear, plain, and incontrovertible, that the testator could not possibly give what he has given consistently with this paramount claim of the defendant."

"Before you can prevent the legal right" (in this case, the defendant's right to one moiety), "the intention must be perfectly clear." The intention must be so clear that a "judge can say, It

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is impossible the testator could mean the defendant to have both." *French v. Davies*, 2 Ves. Jr. 578, 581.

"The clear deduction from all the cases is, that the intent to exclude the right of dower by a voluntary gift, must be demonstrated by express words, or by a clear and manifest implication, and this implication must arise from some provision in the will inconsistent with the assertion of the claim." *Birmingham v. Kirwan*, 2 Sch. & Lef. 441.

"The intention to exclude dower (no express words excluding it), is to be collected by clear and manifest implication from the provisions in the will. To enable us to deduce such an implied intention, the claim of dower must be inconsistent with the will, and repugnant to its dispositions, or some of them. It must, in 349] fact, disturb or disappoint the will. This \*appears to be the result of a historical review of the cases upon this greatly agitated subject." *Adsit v. Adsit*, 2 Johns. Ch. 451.

These principles have been established in cases where it was attempted to put the widow to an election to abandon her legal right of dower, or relinquish all benefits under her husband's will, and are, without doubt, applicable to the present. "It is upon similar ground (alluding to dower cases), that the doctrine of election has been held not to be applicable to cases where the testator has some present interest in the estate disposed of by him, although it is not entirely his own. In such a case, unless there is an intention clearly manifested in the will, or, as it is sometimes called, a demonstration plain, a necessary implication, on his part, to dispose of the whole estate, including the interest of third persons, he will be presumed to intend to dispose of that which he might lawfully dispose of, and no more. 2 Story's Eq. 352, sec. 1089.

Lord Eldon observes, in *Rancliffe v. Parkyns*, 6 Dow, 185 (cited in note to *Dillon v. Parker*, 1 Swanst. 394), that "it is difficult to apply the doctrine of election where the testator has some present interest in the estate disposed of, though not entirely his own."

The following remarks, by an able writer, are clear, and to the point, and evidently sustained by the numerous authorities which he cites.

"The most numerous, as well as the most difficult class of cases," says he, "with which the courts have had to deal, consists



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of those in which the devisor, and the person against whom the election is sought to be raised, have each an individual interest in the property, and in which the question, therefore, is not, as in the cases before discussed, simply whether the testator meant to devise the property generally (for such a devise may be perfectly consistent with an intention to affect his own share only), but whether he intended to devise the land, inclusive of the other party's interest. Of this description are those cases, in which the question is, whether the devisor's widow is precluded, by a benefit given to her by the will, \*from claiming dower out of lands [350 devised by that will. This, at least, is indisputably clear, that a mere devise of such lands affords no indication of an intention to dispose of her dower." Powell on Devises, 442, note 7 (Law Library).

And, again: "In order to raise a case of election against any person claiming dower, or any other interest in the land, it must be "incontrovertibly" manifest, that the testator intends to dispose of that interest, as well as his own. It is admitted on all hands, that this intention is not evinced by a mere gift of the land itself, for it is rather to be supposed that the testator intends to confine his disposition to that which belongs to him; the consequence therefore is, that every devise is first to be read as embracing the testator's own property in the subject, and, if a repugnance be not thereby manifestly produced in the disposition, there is no pretense for extending it to that portion of interest in which he has no disposable property." Ibid. Apply this sensible, practical test, plainly deducible from the authorities, and where is the repugnance? There is none.

Should, however, the court be of opinion that this is a case for the exercise of its power to compel an election, it is claimed that the defendant still has the right to make his election. It is not pretended that he ever knew, or supposed that he was under any obligation to make any election, and his acceptance of the benefits devised to him can not, therefore, be adduced as evidence of election. 2 Story's Eq. 359, and cases cited; 1 Swanst. 381, note *a*.

He is also entitled to a reasonable time in which to make his election.

Wood, J. The complainants claim that the will of William Darling creates a case of election against the defendant.

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To create a case of election, there must be a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both, that one should be a substitute for the other. The party who is to take has a choice, but he can 351] not enjoy the benefits of both. The doctrine of election, \*says Justice Story, is borrowed from the civil law, and by it a testator may bequeath, not only his own property and that of his heir, but also the property of other persons; so that the heir may be obliged to purchase and deliver it, or, if he can not purchase it, to give the legatee its value. To give effect to a legacy in such case, it is necessary the testator should know the property bequeathed by him was not his own; and the devisee, whose property has been thus disposed of, can hold, under the will, only by giving up his own, by which alone the will can have effect. 2 Story's Eq. 338.

Is this, then, a case of election? This must be determined from the whole provisions of the will. The testator when he executed his will was a tenant in common only with the defendant. The southwest quarter of section seven, etc., was patented to both. The testator, therefore, it is true, owned but a moiety, and in the devise in question he gives the southwest quarter of section seven, etc., to his grandson, Jeremiah Beatty. The language, it is said, is plain, clear, and operative, and includes the whole tract.

The case does not appear to us to be so clear "that he who runs may read;" but nevertheless, when we consider the almost perfect equality with which the testator has distributed his property among his children and grandchildren; that when he has given to one, he has likewise given to others, "share and share alike," a majority of the court arrive at the conclusion that by the devise of the whole quarter to Jeremiah Beatty, the testator only designed to convey his own interest. This construction places the devisee on an equality with the other grandson, to whom the half of another quarter in the same section is given, and carries out the general design of the testator, arising on the face of the will, of placing his devisees on a perfect equality in the disposition of his property; sons, daughters, grandsons, and granddaughters, with few exceptions, "share and share alike."

We think no case of election is created, and the bill must be dismissed. Bill dismissed.

**\*JOHN S. LEWIS ET AL. v. CHARLES R. BALDWIN ET AL. [352**

**A** wife may transmit her separate estate, through the intervention of a trustee, to her husband.

**A** conveyance to A. and B., and their heirs, and to the survivor of them, and to the heirs of such survivor, vests in the survivor an estate in fee.

THIS is a bill in chancery, from the county of Franklin.

This bill seeks to set aside a deed executed by Charles R. Baldwin and Mary Jane, his wife, to Robert O. Spencer, in trust, and a deed executed by said Spencer to Charles R. and Mary Jane Baldwin, to them jointly, their heirs and assigns, and to the survivor of them, his or her separate heirs and assigns. The bill sets forth that said Mary Jane owned 783 acres of land, lying in Franklin county, and that she was young at the time of her marriage with respondent Baldwin; was, shortly after her marriage, afflicted with a lingering sickness which terminated her life without issue, and so preyed upon her constitution as to reduce her to a state of debility bordering on infancy, and placed her under the influence and control of her husband, who availed himself of his ascendancy, and, shortly before her death, caused her to execute the deed in question. The answer denies all the charges of undue influence, imbecility, and all fraud. The substance of the testimony, and the points made, are stated in the opinion of the court.

T. EWING, for complainants.

STANBERRY & VAN TRUMP, for defendants.

BIRCHARD, J. The proof establishes these facts: That Baldwin and wife were an affectionate couple; that she reposed entire confidence in him, as her husband, friend, and spiritual \*guide; [353 and it does not show that he was in any respect unworthy of the affection and trust bestowed upon him by this devoted wife. He was a circuit preacher of the Methodist Episcopal church, dependent upon a limited annual stipend for his support. His wife was in ill health, and desirous to bestow upon him a portion of the fortune she had inherited from her parents, in case she should be removed by early death. To accomplish this object, the deed in question was executed, as appears from the deed and answer,

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at her own instance, three months before her death, at a time when she was able to ride four miles, in company with her sister, and another young lady, to effect this object, and when, for aught that appears, she was of sufficient mental capacity to make a contract. We are of the opinion that there is not proof, in this case, sufficient to require or justify the setting aside these conveyances, on the ground of want of capacity in Mrs. Baldwin, or for the exercise of any improper or undue influence over her, at the time of executing them.

It is objected, in the next place, that a conveyance by a husband and wife of her separate estate to trustees, upon trust to reconvey to them jointly, is invalid in law and equity. It is assumed that the deed is liable to the same objection that exists to a transaction of the kind between guardian and ward. There does not seem to be much analogy between the two cases. Our statute authorizes a wife to convey her property by pursuing a given form, which, in this case, was pursued. Nor can she be treated as laboring under any of the peculiar disabilities incident to infancy. The law does not attempt to limit or control her judgment in the disposition of her property. It is true she can not convey directly to her husband; and the reason is to be found, not in the fact that he is supposed to have an undue influence over her—not that there is anything unnatural in a wife's desire to make provision for an affectionate and beloved husband, out of her more ample fortune, but, in the legal fiction, that, by marriage, her existence is merged in that of her husband, and therefore one of the two parties necessary to make a valid contract is wanting. Hence, in a \*conveyance from husband to wife, or *e converso*, the intervention of a trustee is necessary to effect the object; such is the authority in 4 Mason, 45, where a conveyance, scarcely distinguishable in principle from this, was sustained.

The next objection is a want of consideration. The deed of trust expresses the consideration of one dollar, and, in substance, a desire, from love and affection, to make provision for her husband, inasmuch as her brothers and sisters are otherwise amply provided for. Would it be doubtful, in a case where other persons than husband and wife were parties, that this consideration is sufficient? If not in such a case, why should it be in this? Counsel have furnished us no satisfactory reason, and none occurs to our own minds.

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The remaining question is, as to the nature of the estate conveyed by the deed from Spencer, the trustee, to Baldwin and wife. The grant is to them "jointly, their heirs and assigns, and to the survivor of them, his or her separate heirs and assigns."

Complainants contend that this makes them tenants in common with Baldwin, because, otherwise, the deed would be considered as creating a joint tenancy. But the respondent, Baldwin, has a fee by the terms of the grant, which was to him as survivor, and to his heirs and assigns. The deed gave a joint estate to the husband and wife, during their lives, and a grant over to him, as survivor, of the entire estate.

No perpetuity is created by such a grant. He holds title, not upon the principle of survivorship, as an incident to a joint tenancy, but as grantee in fee, as survivor, by the operative words of the deed. The entire estate, by the death of the wife, is vested in him and his heirs. This is the effect of the words of grant, contained in the instrument of conveyance. Bill dismissed.

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**\*DAVID LORING v. JOHN MELENDY, E. W. CHESTER, ED- [355**  
**WARD D. MANSFIELD, ARTHUR ELLIOTT, ET AL.**

Where, prior to a judgment, a permanent leasehold estate has been conveyed by deed, absolute upon its face, though intended as a security, there only remained an equitable interest in the judgment debtor, to which no judgment lien attached; and a judgment creditor who first pursued the equity by bill, is entitled to be first satisfied.

A permanent leasehold estate is not a chattel, but is realty, subject to all the laws and rules which attach to land.

THIS is a bill in chancery from Hamilton county.

The facts are stated in the opinion of the court.

E. S. HAINES, for complainant, cited 1 Ohio, 314; 5 Mass. 419; 6 Ohio, 162, 163; 4 Johns. Ch. 690; 3 Ohio, 465, 517; 8 Ohio, 22, 23.

H. HALL, for defendant Melendy.

READ, J. This bill was filed to subject an equity to the satis-  
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faction of a judgment at law, and involves a question of priority of liens.

Judgment at law had been obtained against E. W. Chester, in favor of Loring, Elliott, and the Lafayette Bank.

Chester, the judgment debtor, had conveyed the premises in question to John Melendy, by deed, absolute upon its face, though in fact a mortgage, bearing date April 13, 1838, which was recorded on January 2, 1839. The premises thus conveyed were a perpetual leasehold estate—a lease for the term of ninety-nine years, renewable forever.

Elliott had obtained two judgments against Chester and Mansfield, the latter as security, at the October term of the superior court of Hamilton county, 1838, and caused execution to be levied upon said leasehold estate on March 19, 1839.

356] \*David Loring, the complainant, also obtained a judgment against Chester at January term of said superior court, 1839, and caused execution to issue, which was returned *nulla bona*. Loring filed his bill to subject the equitable interest of Chester in said premises, to satisfy his judgment, on April 17, 1839, subsequent to Elliott's levy.

Judgment was also obtained against Chester, in favor of the Lafayette Bank.

Under this state of facts, Melendy claims that his debt, secured by mortgage, shall be first satisfied.

Elliott claims to overreach Melendy's mortgage, by virtue of a judgment lien obtained prior to the recording of the mortgage.

Loring claims that Chester's interest in the premises is but an equity, and that having first filed his bill, to subject it, he is entitled to have his judgment first satisfied, after Melendy's mortgage debt, and that the other judgment creditors are entitled but *pro rata* to the residuo.

These questions are all disposed of by determining the nature of Chester's estate in the premises.

By the execution of the deed to Melendy, which was prior to all the judgments, Chester's whole legal estate passed, and left with him the bare equity to redeem on payment of the debt secured. The deed was absolute upon its face, and, for all legal purposes, transferred the whole legal estate. Judgments and executions at law can only affect and reach the legal estate.

In *Baird v. Kirtland*, 8 Ohio, 23, the court say, in order that a

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judgment may operate as a lien, the defendant or judgment debtor must have a legal title. The fact that in equity the grantor would have a right to treat the deed as a mortgage, will in no sense authorize it to be treated as a legal estate. The distinction is between an equitable and legal mortgage.

In case of a legal mortgage, which the court, in *Baird v. Kirtland*, define to be a mortgage, where the condition of defeasance constitutes a part of the deed, although the mortgagor, \*in [357 possession, is treated as the real owner at law, and possesses an estate to which judgment liens attach, and which may be sold on execution at law, yet, in the case just cited, it is expressly declared that when the deed is absolute upon its face, no such legal estate remains in the grantor. The express point of the case was, that where the deed was absolute upon its face, the grantor had no interest upon which a judgment lien could attach.

Elliott, then, takes nothing by virtue of his judgment lien and levy, because neither can reach an equity. Melendy having the legal estate by virtue of his deed, which in equity is a mortgage, is entitled to have his debt first satisfied.

Loring, having first subjected Chester's equity, is entitled, by reason of his superior diligence, to have his judgment first fully satisfied after Melendy; and Elliott, and the other judgment creditors, will come in, *pro rata*, for the residue.

This disposes of the whole case, although it was reserved to determine the question, whether a perpetual lease was to be regarded as a mere chattel, or as "lands and tenements," to which judgment liens attach.

Whether we call it lands and tenements, or a chattel, we should arrive at the same result, respecting the rights of these parties, which we have above declared. For, although a perpetual lease may be called a chattel, yet, for all purposes of conveyance or sale, it has always been treated as land capable of being charged, incumbered, and disposed of, only in the same manner.

In the case of the Widow and Heirs at Law of William Reynolds v. The Commissioners of Stark County, 5 Ohio, 204, the court say: "A lease is personal property, although it contains a stipulation that it shall be renewable forever."

But it has been the policy of our law for many, and, in fact, for most purposes, to treat permanent leases as lands; such has always been the case for purposes of sale and transfer; and the question.

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is now, whether such leases are not put upon the footing of lands for all purposes.

358] \*By the act of June 20, 1821, Chase's L. 1185, it is declared that permanent leases, in cases of judgments and executions levied thereon, shall be considered as real estate, and shall be governed, in their sale, by the laws applicable to the sale of real estate then in existence, or such as may be enacted. By the act of March 5, 1839, Swan's Stat. 289, permanent leasehold estates, for the purposes of descent and distribution, and for sales on execution, are subject to the same laws that apply to estates in fee.

Since the passage of this last act, we may feel ourselves admonished by the uniform policy of our legislature, by calling things by their real names, to harmonize our whole system of land jurisprudence. To withdraw permanent leasehold estates from their anomalous position, between chattel and realty, and by calling them what in truth they are, lands, we relieve them from all doubt as to the principles and laws which shall control them, and assign to them a certain and fixed place in the law. A permanent leasehold estate is not a chattel, but is, in truth, land, carrying the fee. Such is the nature of the estate, and so it has been considered and treated in the legislation of our state. We therefore declare that permanent leasehold estates are lands subject to all the rules and laws which attach to land for all purposes, and that judgment liens attach to them as lands.

In thus emancipating permanent leasehold estates from a name too narrow to convey their idea, and rules too contracted for their control, we are only carrying out the policy of our legislature upon this subject. And although this case might have been disposed of without deciding this point, yet as it fairly comes up, and was the point upon which the case was reserved, we have thought proper to put this doubtful question at rest.

Decree for complainant.



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Lessee of Northrop v. Devore.

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**\*THE LESSEE OF THOMAS J. NORTHPROP v. JAMES DEVORE. [359**

**THE LESSEE OF DEMAS ADAMS AND WILLIAM L. CASEY v. ANDREW  
BAINTER.**

When a sale for taxes is made on the 10th day of November, under the statute of 1822, and the order of confirmation describes a sale made on the 10th, 11th, and 12th days of December, no title passes.

THESE were actions of ejectment from the county of Muskingum, and were submitted to the court upon an agreed statement of facts.

HARPER, ADAMS, and STILWELL, for plaintiffs.

GODDARD and CONVERSE, for defendants.

No arguments were furnished to the reporter.

LANE, C. J. In these cases it is necessary to notice but one point. The plaintiff holds the title claimed from the patentee, and is entitled to recover, unless his right has been extinguished by a tax sale. The sale was made under a judgment rendered under the statute of 1822, to recover taxes delinquent previous to 1820. The statute required a judgment, advertisement, sale, confirmation, and deed. Chase's Stat. 1216: The judgment was rendered in the common pleas of Muskingum, at the August term, 1824. The land was advertised for sale, and sold on November 10, 1824. At the December term, held on December 12, 1824, an order of confirmation was made, reciting that the sale was made on the 10th, 11th, and 12th days of December.

This mistake in the description of the time of sale appears to us a fatal defect in the defendant's title. Although it is argued that no other sale was made, except that on the 10th of November, \*and the time is probably misdescribed through the inad- [360  
vertence of the clerk, yet, as the order stands, it affords no evidence that the sale of November was ever acted upon by the court.

Judgment for plaintiff.

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Woodward v. Suydam and Blydenburg.

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**EBENEZER G. WOODWARD v. SUYDAM AND BLYDENBURG.**

Where a commission merchant, from time to time, sends an account of sales to his principal, who makes no objection to the sales, and draws for the balance of the account rendered, it is a ratification of the sales, and the principal can not recover for any alleged violation of his instructions as to the terms of sale.

The value of goods sold by a commission merchant, contrary to the instructions of his principal, may be recovered, under the common count for goods sold and delivered.

THIS was an action of assumpsit from the county of Knox, reserved on a motion for a new trial by the defendants, against whom a verdict was rendered on the circuit.

The case was argued, in support of the motion, by H. B. CURTIS, and GODDARD & CONVERSE, and by C. DELANO and H. STANBERRY, contra.

The material facts and points made are stated in the opinion of the court.

WOOD, J. The declaration contains four counts. In the first, second, and third counts, the defendants are charged, as factors and commission merchants, with having received 1,392 barrels of flour of the plaintiff, on consignment, with instructions not to sell for less than eight dollars per barrel, and with having disregarded such instructions, to the damage of the plaintiff.

361] \*The fourth is a common count, for goods, wares, etc., sold paid, and delivered, work and labor done, money lent, had and received, and on an account stated. Plea, *non assumpsit*.

The reasons filed for a new trial are:

1. The verdict is contrary to the evidence.
2. The damages are excessive.
3. The evidence was not admissible under the declaration.

On the trial of the case, it appears to have been proved, in substance, that, on May 28, 1838, the defendants were instructed by the plaintiff not to sell his flour, when it should arrive, for less than eight dollars per barrel cash. The defendant resided in the city of New York, and, between the 10th and 20th days of June, the flour was arriving in the city, and the defendants put-

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ting it in store in their upper lofts. The defendant, Blydenburg, about this time, showed it to a Mr. Norton, representing it as a superior article, saying he was waiting a rise in the market, and was not at liberty to sell it at less than eight dollars per barrel, according to the plaintiff's directions.

On June 19, 1838, the defendants wrote to the plaintiff that all his flour was in store, and they were waiting the market and his orders. On the 3d of July, they again wrote to the plaintiff, advising him of the market, and desiring his opinion, as to sales, etc. On the 16th of July, the defendants again wrote to the plaintiff that his letter of the 10th of July was received, and his intention, in relation to the flour, should be attended to. On the 26th of July, they again wrote, they had stored all the plaintiff's flour, and, of course, had not offered any for sale, except fifty barrels of Norton's brand, which they had sold on the 15th, with a view to ascertain how it kept, and should make no further sales until they heard from him.

On the 10th of July, the plaintiff wrote to the defendants, amongst other things, "I wish you to hold on to my flour, unless you can obtain somewhere in the neighborhood of eight dollars per barrel, etc.; I shall be in New York in August." \*On the [362 19th of July, the plaintiff again wrote to the defendants, to hold on to his flour until August or September, if it should not advance before, and again repeated, he would be in New York in August.

The flour was sold in New York, between the 10th of July and 13th of September, for \$9,844.32, or a fraction more, on an average, than seven dollars and seven cents per barrel. It is pretty clearly shown that the plaintiff arrived in New York in August, and, while there, 483 barrels of this flour were sold by the defendants; that the plaintiff had frequent interviews with the defendants, while in the city; that 813 barrels of the flour had been sold before the plaintiff arrived, and 96 after he left the city. The plaintiff appears to have received of the defendants, while in New York, \$1,500; and there is no evidence of any dissatisfaction, expressed by him to the defendants, whilst there.

On the 17th of September, the defendants transmitted to the plaintiff an account of all the sales of the flour, and the plaintiff drew for the balance in their hands, and expressed no disapprobation. The evidence also shows that, in September, flour advanced

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in the market to \$9.50 per barrel. This was after the most of the plaintiff's flour had been sold. These are substantially the proofs.

The counsel for the defendants then asked the court to instruct the jury that the plaintiff was not entitled to recover, because of the variance between the proof and the declaration. The court instructed the jury, that, as the declaration averred, the defendants received the flour to sell at eight dollars per barrel, the averment was not sustained by the plaintiff's letter of instructions, of the 10th of July, to hold on to his flour, unless they could obtain somewhere in the neighborhood of eight dollars per barrel, and that the plaintiff was not entitled to recover under the special counts, but that the evidence was properly admissible under the common count for goods sold and delivered; and the rule of damages would be, the value of the flour at the time it was sold by 363] the defendants, in violation of their \*instructions; and it was the real value, at the time of sale, which should be ascertained.

With these instructions, the court are satisfied. They are, doubtless, the law of the case, as the evidence appeared on the trial. As the flour was sold by the defendants contrary to the plaintiff's directions, it appears to us the plaintiff is authorized by the books to treat them as purchasers, and to recover the value, as for goods sold. 5 Ohio, 349; 7 Johns. 132; 12 Wend. 38. But, taking this view of the case, the damages are unquestionably excessive, upon any legal calculation which can be made. We shall not, however, go into particulars upon this point, as there is another view of the case upon which a new trial should be granted, and, from the evidence, as before presented, leaves it clear, in our opinion, that the verdict should have been for the defendants.

The evidence is, that the defendants, frequently, from time to time, advised the plaintiff of the sales of the flour; a part of it was sold while he was present in New York; he received advices of the last of the sales, and drew for the balance of the money in the defendant's hands; and at no time disaffirmed, disapproved, or censured their proceedings, until the institution of this suit.

The plaintiff, therefore, in our opinion, falls within the principle recognized by Justice Story, in his work on Agency, and which is supported by numerous authorities cited by him, in the margin of the same page, that, "If a factor should sell goods for a price below his limits, and should send an account of his sales to his principal, who should make no objection, but should draw for

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the balance admitted to be due on the account, it would amount to a ratification of the sale." Story on Agency, 252.

This seems to be the identical case before us. A new trial must be granted, at the defendants' costs.

New trial granted.

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**\*ABRAHAM CASE v. COLUMBUS HART AND JAMES W. HUMPHREY. [364**

A landlord leasing to a cropper for one year, reserving, as rent, a part of the grain, has a lien upon the growing crop, and the entire crop can not be removed by the tenant, or those acting under him, until the rent is provided for.

Trover will lie for the landlord's share.

THIS is a motion for a new trial, in an action of trover, from the county of Huron.

It is submitted to the court upon the following agreed case :

"On February 12, 1839, the plaintiff, Case, leased to Petty and Brayton a portion of his farm, in the township of Lyme, Huron county. The material parts of the lease are as follows: 'Article of agreement, made this February 12, 1839, between Abraham Case, of the first part, and Charles Petty and Rufus Brayton, of the second part, witnesseth: the said party of the first part agrees to rent to said party of the second part the west side of the road running through the farm of the party of the first part, in Lyme, for one year. The party of the second part is to till forty acres of land, in a good workmanlike manner (twenty-five acres of corn, and the remainder of it in oats and wheat), and to deliver to said party of the first part, in the half-bushel, one-third part of all the grain that is raised on the above-mentioned land.'

"Shortly afterward, Petty bought out Brayton, and became the sole owner of the interest in the lease. About November 1, 1839, James Hamilton and Bruno Silva, two of the creditors of Petty, recovered judgments against him, one in the sum of \$25, and the other about \$30; and on these judgments executions issued the same day, placed in the hands of the defendant, Humphrey, who was the constable of the township, and who afterward made

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return thereon that he had levied the same on a field of corn (being a field of corn then standing on the leased premises, and cultivated under said lease by Petty), and, on November 12, 1839, 365] as \*appeared from the return, he sold the corn to the defendant, Hart. It appeared in evidence, that Hart was security for the defendant, Petty, in the judgments, and that, in bidding, he did so at the instance of Hamilton, who was absent on the day of sale, and that the bid was made to secure himself and the plaintiffs in the judgments; and that this was the arrangement by which Petty was to go on under the lease, harvest the corn, and pay the judgments.

"Petty went on and harvested the whole field of corn, and evidence was introduced by the plaintiff, which tended to prove that Petty harvested the whole field of corn by the direction of the defendant, Hart, and as his agent; but as to this last point there was some conflicting testimony. Petty removed all the corn from the field. A load or two only was taken to the barn of Hart to be thrashed, and only this ever came to the possession of Hart. There was evidence that the plaintiff said to Hart, after the purchase, that there was corn enough to pay him and to pay the judgments too. The return on Silva's execution is in these words: 'Nov. 12. Sold the property to Mr. C. Hart, for which Hart had not paid when the proceedings were stayed by order of plaintiff.' The corn was husked out by Petty, and enough of it to satisfy the judgments went to pay them; but the plaintiff, Case, never got any of it.

"The counsel for the defendants asked the court to charge the jury, that, though the return was of a levy on the whole field, yet, if they believed that the constable, at the sale, and Hart, then and afterward, only intended to claim the two-thirds of the corn which belonged to Petty, and that Petty was not authorized by Hart to harvest or take away any more from the field, that then the plaintiff ought not to recover.

"This charge the court refused to give, but did charge the jury that, under the above lease and evidence, neither the constable, Hart, nor the tenant would have any right to take away any portion of the corn, until he had first set it out to the plaintiff, Case, the part that belonged to him. To this charge the defendants objected and asked for a new trial."

\*No argument for the plaintiff came to the hands of the [366 reporter.

BOALT & WORCESTER, for defendants, argued :

That the lease of the plaintiff, to Petty and Brayton, passed an interest in the soil, and was a lease for a year, and not a contract which merely authorized them to enter and cultivate the soil for a single crop. 4 Kent's Com. 85, 95; 1 Johns. 267; Hill. Abr. 133; 9 Johns. 113; 4 Dana's Abr. 129.

That no interest in the corn or other grain vested in the landlord until the grain was harvested and his share separated from the mass by delivery. 9 Johns. 113; 5 Pick. 522; 1 Hill. Abr. 148, and cases there cited.

That no such interest is vested in the landlord by the statute. Swan's Stat. 520, sec. 84. The construction of this statute being undetermined by our own courts, we may look to similar statutes in other states. In Kentucky, a statute for like purpose is in force, to which the English decisions upon 8 Ann, ch. 14, have been held applicable. 2 Dana, 208; 3 Dana, 211. So, also, have been the decisions in New York upon their statutes, in relation to this subject. 11 Johns. 186; 17 Wend. 39; 13 Serg. & Rawle, 297. Upon the construction of these statutes, and 8 Ann, ch. 14, it has been decided, that the lien applies only to the immediate landlord, and not as between the ground landlord and a sublessee. Burnet's case, Strange, 787. That the landlord must notify the sheriff of his lien prior to a sale under judicial process and demand his rent, otherwise it is not the duty of the sheriff to retain the rent. Warring v. Duberry, Strange, 97. This notice is required from the nature of the case, although the statute is silent. 1 Strange, 214; 2 Wils. 240; 11 Johns. 186; 17 Wend. 39; 4 Wend. 476; 2 Dana, 209; 3 Dana, 211; 5 Watt, 139; 13 Serg. & Rawle, 297. If the sheriff, after demand, remove the goods, he is liable only for their value, deducting expenses. \*Dodd v. Saxby, [367 Strange, 1024. The remedy of the landlord is by motion to the court, that the money be paid to him, or by a special action on the case. 2 Wils. 140; 17 Wend. 39; 4 Wend. 576. The rent must be that of the year immediately preceding the execution. 1 Strange, 214. A bill of sale of the goods is a removal of them, and vests the title in the purchaser unincumbered by the landlord's lien. 1 Atk. 104; 2 Dana, 209. The purchaser under exe-

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cution acquires a title discharged of the lien, and no suit will be against him for the property. 2 Dana, 212.

They contended that the plaintiff had not, either at common law or upon a proper construction of the statute, such property in the crop as to maintain trover, and that the facts did not show a conversion sufficient to support such action.

BIRCHARD, J. By the terms of the agreement, which is a lease to a cropper for a year, the landlord was to receive one-third of the corn and oats raised, to be delivered in the half-bushel. The position taken by the defendants' counsel, upon which turn the whole merits of this motion, is, that until the delivery of the third part of the crops reserved as rent, the landlord had no property in them, and that consequently trover does not lie. By the usage of the country, so long continued as to have become the law of the land, a landlord thus leasing has a lien upon or property in the growing crop until the rent reserved is satisfied. The rent is the joint production of the lessor's land and the labor of the lessee. By section 84 of Swan's Stat. 520, this lien or species of property in the landlord is recognized, and provision is made by which the interest of landlords or tenants, respectively, in the growing crop may be sold, on execution, subject to the interest or claim of the party, whether landlord or tenant, against whom the process may not issue. To preserve this lien, therefore, it is necessary to hold that the entire crop should not be removed by the tenant, or those acting in his behalf, or as successors to his rights, without first satisfying the landlord's rent. But the conversion, occupying the place of the tenant in this matter, seized and sold, and the purchaser carried away, the whole crop, by which the landlord's interest in it was lost. The sale wrought as to him a conversion and destruction of the whole property. The instruction to the jury, that the plaintiff could not recover if neither of the defendants intended to take more than two-thirds of the crop, was properly refused. The intention with which the act was done could not excuse them from responsibility. Their acts were an illegal violation of the plaintiff's rights, and, if arising in innocent mistake, they are responsible for the actual injury committed by them or their agent.

We think the action of trover will lie, and that the value of the landlord's share of what was taken, is the rule of damages.

Motion overruled.



• **THE COMMISSIONERS OF TRUMBULL COUNTY v. JOHN HUTCHINS.**

The county commissioners are, by law, required to furnish buildings and everything necessary to be used and employed in the public administration of justice, and are chargeable with the purchase of a press for the seal of the court.

The secretary of state is required, by law, to furnish all seals for the several courts, as well in case of loss as in the first instance.

Assumpsit is the proper form of action against the commissioners, by the clerk, for the price of the press.

THIS is a writ of error to the court of common pleas of Trumbull county.

The suit below was an action of assumpsit, brought by John Hutchins, clerk of the court of common pleas of the county of Trumbull, against the commissioners of said county, to recover the price of a press and seal purchased by said Hutchins for the use of his office. It was submitted to the court upon an agreed state of facts, which were, in substance, as follows:

\*The plaintiff's demand was for money, paid by him, for [369 a press and seal for the use of his office, as clerk of the court of common pleas for Trumbull county, the old one being broken and unfit for use. The county commissioners had not been consulted, nor had they authorized the purchase, or been informed of the fact, until after the purchase was made. After the purchase the account was presented to them, and disallowed, before the bringing of this suit.

The defendant moved for a nonsuit, upon the ground that the commissioners of the county neither authorized the purchase nor assented to it, either before or after it was made, and for the additional reason, that if the plaintiff could recover at all, this was not the form of action, but the plaintiff should have appealed from the decision of the county commissioners in rejecting the account. The court below refused such nonsuit, but rendered judgment in favor of the plaintiff for the amount claimed as the price of the press and seal.

To reverse this decision, this writ of error is brought.

CROWELL & ABELL, for plaintiff in error, made the following points:

1. The present action can, in no event, be maintained: 1. Be-

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cause the press and seal are not proper subjects of county expenditure; they should be furnished by the secretary of state.

2. The action is barred by the decision of the commissioners, rejecting the account on which it is brought, from which no appeal was taken, as the law provides. 3. There is no promise, either express or implied, on the part of the commissioners, to pay the amount, the purchase having been made without their knowledge or consent, and against their will, and though they "may sue and be sued," it will be seen that it is only upon contracts to which they are parties, or have given their assent, as officers of the county, whose duties are prescribed, and whose powers are limited by law.

2. The only appropriate remedy, if the commissioners were wrong in rejecting the account, is by *mandamus*, to compel them [370] to do their duty and allow it. In this proceeding, the \*whole question could be determined; as well the power of the clerk to bind the commissioners by contract, made without their knowledge or consent, as that of the commissioners, by refusing to pay what they deemed an unlawful demand, to protect the county treasury from unauthorized expenditures.

3. Of all the officers of the county, the commissioners alone are empowered to levy taxes on the people, and for this reason, among others, it seems to be the policy of the law, and it is certainly a wise policy, to limit and confine the power of incurring expenses for "county purposes" to them solely, who alone can levy taxes to pay them.

They cited, in support of their positions, the following authorities: Swan's Stat. 206, 207, 402, 509, 740-742, 849, 850; Commissioners of Brown County v. Butt, 1 Ohio, 446; 5 Ohio, 490, 542; Smith v. Commissioners of Portage County, 9 Ohio, 27, 28.

JOHN HUTCHINS, for defendant in error, contra:

READ, J. This record raises the question simply whether the county commissioners are, in law, bound to furnish the clerk with the seal of the court of common pleas of the county, and a press necessary to its use, and if so, whether an action of *assumpsit* will lie, for the price of their purchase, by the clerk.

If it be the legal duty of the commissioners to furnish the press

and seal, the price paid for their purchase by the clerk, is properly recoverable in an action of *assumpsit*.

A press, of some description, is necessary to the use of the seal of the court. The seal is the legal authentication of the process and the records of the court, and it is the duty of the clerk to affix it. Thus, under our law, a seal is incident to the administration of justice, and the press a necessary incident to the seal. Both are therefore connected with the administration of justice, as means or instruments necessary for the performance of absolute legal requirements. The administration of justice \*is a [371 public charge, and so is everything necessary to its administration.

It is the legal duty of the county commissioners to furnish all things coupled with the administration of justice within the limits of their own county. It is their duty to furnish suitable and convenient buildings for holding court, at the expense of the county; and fire-proof offices for the use of the clerk, and for the preservation of the records and papers connected with the business of the court. In fitting up their court rooms and offices, it is the duty of the commissioners to fit them up as court rooms and clerks' offices, and this requires that they should be supplied with, and contain those things which are necessary to enable the officers for whose public use they are fitted up, to perform their official duties. But the court in this case conceive that a proper construction of the words of the statute, which declares that "the clerk shall receive a reasonable allowance for blank books and stationery," includes the press necessary to the use of the seal, and requires the county commissioners either to furnish or pay for it out of the county funds. The word "stationery" embraces all things necessarily employed by the clerk for the purpose of writing and authenticating every species of writing which the law requires the clerk to write and authenticate; especially all such things as are necessarily connected with the office for such purpose. The press is an article of this description. Upon these grounds, so far as the press alluded to is involved, the clerk would be entitled to recover. But as to the seal of the court of common pleas, the county commissioners are not bound to furnish it. The statute provides that the secretary of state shall furnish the seal of the several courts to their respective clerks.

The words of the statute are "that the secretary of state shall procure, at the expense of the state, for each organized county,

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where the same has not been done, a seal for the Supreme Court and court of common pleas, of the same description and device with those heretofore furnished to the clerks of the respective counties."

372] \*It has been supposed by some, that the secretary of state is only bound to furnish the first seal to newly organized counties, and not to supply counties which have had seals with new seals, in the place of such as may have been lost, worn out, or otherwise rendered unfit for use. Such is said to have been the construction put upon this act by the practice of the several secretaries of state. Such construction the court conceive to be erroneous, and we hold that the secretary of state is required by the act to furnish seals for the courts of all counties which have no seal, as well to counties that have had seals, which have been lost, worn out, or otherwise rendered useless, as to newly organized counties that have never had a seal. The statute intends to secure similarity or likeness of seal of the same courts. To furnish such devolves upon the secretary of state. If called upon, it is his duty to furnish seals to all counties which have none.

The intention of the legislature would be as liable to be defeated if the secretary of state should not replace seals, as in a neglect to furnish them in the first instance. The seal of the courts was not, therefore, a county charge.

The court below erred in rendering judgment for the price of the seal purchased by the clerk. Judgment reversed.

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PARKER JEFFRIES v. JOHN ANKENY ET AL

A person, the offspring of a white man and a half-breed Indian woman, is a lawful voter.

An action on the case lies against township trustees, for refusing a lawful vote, without proof of express malice.

THIS is an action on the case from Greene county.

The suit was brought by the plaintiff against the trustees of Zenia township, for refusing his vote. The case was reserved to determine the law arising upon a special verdict.

\*The jury find the defendants presiding as judges of a [373 legal election, and that the plaintiff tendered his vote, and offered to prove his qualifications, but that the defendants rejected his vote, because, they said, they were of opinion the plaintiff was "a person of color." That the plaintiff was of the Indian race, without more than one-fourth Indian blood. If, upon the facts, the court should hold the plaintiff entitled to recover, they assess his damages at six cents.

J. S. PRESCOTT, for plaintiff in error:

In this case I shall trouble the court, on the part of the plaintiff, with remarks only as to one point of the case. That is, does the action lie against trustees, for refusing the vote of a citizen legally authorized to vote?

The only case I shall cite the court, is *Ashby v. White*, 2 *Ld. Raym.* 938, 950. In that case the action is sustained, and, as far as can be gathered from the report, without regard to the motives of the officers refusing the vote, and, therefore, probably from the necessity of the case, for otherwise the party would be without remedy. I believe it has been the practice of the Supreme Court of this state to support similar actions against school directors. I would ask the court to consider the following points:

1. The importance of the right, and that every citizen, lawfully entitled, should be permitted to enjoy that right.

2. Unless this action can be sustained, the right is at the complete mercy of the trustees, as it must be always easy for them to give an excuse for the rejection of any vote opposed to them politically or otherwise.

3. There is no other remedy.

ELLSBERRY and HOWARD, for defendant:

By the constitution of the State of Ohio, the right of suffrage is conferred upon white persons, and them alone. Constitution of Ohio, art. 4, sec. 1.

\*It is a principle at law, fully sustained by authority, that [374 no action can be maintained against a judge or justice of the peace, acting judicially, in a matter within the scope of his jurisdiction, although he may decide erroneously in the particular case. 1 *Salk.* 306; *Ld. Raym.* 466; 5 *Term.* 186; 3 *M. & S.* 411; 6 *Bing.* 85; 5 *Johns.* 282; 9 *Johns.* 395; 10 *Mass.* 356; nor can an action be maintained against a juryman, or the attorney-general. 1 *Term.* 513, 514, 535. Nor against a superior mili-

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tary or naval officer. 1 Term, 493, 510, 784; 4 Taunt. 67; 1 Chit. Pl. 89.

The trustees of townships are judges of elections. Swan's Stat. 306.

The act of passing upon the qualifications of an elector is a judicial act.

LANE, C. J. The first question arising is, whether such a suit is maintainable against officers like these, without averments and proof of malice. The negative is holden in some of the United States: 6 Johns. 114; 1 New Hamp. 88; 6 Serg. & Rawle, 35; and such seems to be the law of England, 1 East, 555. A different doctrine has obtained in Massachusetts, 2 Mass. 236; 11 Mass. 350; 7 Pick. 485; and this position conforms to the opinion of Holt, in *Ashby v. White*, Ld. Raym. 938. It is generally true, that no suit lies against an officer, for a mistake in the exercise of his judicial discretion; but when we reflect how highly the privilege of voting is generally valued, and that the legislature has provided, and the forms of law admit no other remedy than this action, we unite in the opinion, that a necessity exists for entertaining this remedy. In the absence of malice, where the suit is brought merely to assert the right, the damages will be nominal and small. It is only in cases of intentional injury, arising from corrupt motives, that the jury will be likely to inflict a severe penalty.

The other question depends upon the construction of that passage of the constitution, "free white citizens," whether it 375] \*excludes from voting all persons having the intermixture of any other blood than that of entirely white persons. There have been, even in this state, since its organization, many persons of the precise breed of this plaintiff, I mean the offspring of whites and half-breed Indians, who have exercised political privileges and filled offices, and worthily discharged the duties of officers. One such is now a clerk of this court, and two are now members of this bar, and disfranchisement, for this cause, will be equally unexpected and startling.

We regard this matter as clearly settled by the interpretation which the expression in the constitution has received by this court, on the circuit and in bank. In 1831, in the case of *Polly Gray v. State of Ohio*, 4 Ohio, 354, and in 1833, in the case of *Williamson v. School Directors, etc.*, Wright, 178, it was held that, in the

constitution, and the laws on this subject, there were enumerated three descriptions of persons—whites, blacks, and mulattoes—upon the two last of whom disabilities rested; that the mulatto was the middle term between the extremes, or the offspring of a white and a black; that all nearer white than black, or of the grade between the mulattoes and the whites, were entitled to enjoy every political and social privilege of the white citizen; that no other rule could be adopted, so intelligible and so practicable as this; and that further refinements would lead to inconvenience, and to no good result.

A majority of the court abide by this construction.

Judgment for plaintiff.

READ, J., dissenting. I can not concur in the opinion of a majority of the court in this case. It is similar, in principle, to the case of *Thacker v. Hawk et al.*, and was considered with it.

Section 1 of the "act for the support and better regulation of common schools," etc., passed March 7, 1838, limits the common school fund to the education "of all white youth in the state."

The words of the statute, in my opinion, excludes Indians and part Indians, and all persons not of the pure blood of the white race. For my views, fully, upon the meaning of the word [376] *white*, as applied to designate races of men, I refer to my dissenting opinion to the case of *Thacker v. Hawk et al.*

The Indians are a distinct people, governed by their own laws and customs. And we can not presume that a law conferring the benefit of an educational fund upon our own people embraces them, unless they are expressly named.

Indians are not designated as white men. If not, part Indians can not be pure white; and, to hold that all persons less than half Indian, are white, would establish a principle that would make all persons less than half black, or negro, *white*. This would admit into our common schools all persons who were less than half negro, or black. Now, it is known that the people of Ohio will not permit their children to be compelled to associate with persons of part negro blood in our schools. To prevent this matter, the phraseology of the statute was carefully worded.

If it be desirable to extend the benefits of the educational fund of Ohio to Indians, and part Indians, the statute must be altered; as it now stands, it excludes them.

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Thacker v. Hawk et al.

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## EDWILL THACKER v. JOHN HAWK ET AL.

Where the court of common pleas instructed the jury that a man who has any negro blood whatever was not a lawful voter, it is error.

THIS is a writ of error to the court of common pleas of Gallia county.

The original action was against the defendants, trustees of Wilkesville township, for refusing to receive the plaintiff's vote at an election for justice of the peace. On the trial, the following bill of exceptions was taken :

**377]** \*Be it remembered, that, on the trial of this cause in the court of common pleas of Gallia county, at the April term thereof, A. D. 1841, the evidence on both sides being closed, some of which evidence, offered by the defendants, tended to prove that the plaintiff in this case had some negro blood in him, the plaintiff moved the court to instruct the jury, that, if the plaintiff was nearer white than a mulatto, or half blood, he was entitled to vote at said election, which instruction the court refused to give to the jury ; but the court did instruct the jury, that if the plaintiff had in him any negro blood whatever, he was not entitled to vote at said election, and, thereupon, the said plaintiff excepted to such refusal and instruction, and prayed that his bill of exceptions on that behalf might be allowed, which is accordingly done, and, upon his motion, the same is ordered to be made a part of the record in this case."

SIMEON NASH, for plaintiff in error :

There are two questions presented by this record :

1. Can an action be sustained against the trustees of townships for refusing to receive the vote of one legally entitled to vote, unless proof can be adduced of their having acted maliciously? This question was also raised by the demurrer to the second count.

In Massachusetts, this question has been expressly decided, after the gravest consideration. Such actions are there maintained upon great principles of public policy. *Killman v. Ward*, 2 Mass. 236; *Lincoln v. Hopgood*, 11 Mass. 350; *Henshaw v. Foster et al.*, 7 Pick. 322; *Cassen v. Foster et al.*, 12 Pick. 485. The same doctrine has been maintained in the State of Maine. *Osgood v. Brad-*



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ley, 7 Greenl. 421. In the case of *Williams v. Directors of School District, etc.*, Wright, 578, a similar action seems to have been maintained against school directors, for not permitting plaintiff's children to attend the public school. No malice seems to have been imputed to the directors.

\*There is one decision against this doctrine—*Jenkins v. [378 Waldron, 11 Johns. 114.* In this case, the court decided that the action could not be maintained, without proof of malice. The opinion of the court is brief, and predicated upon the assumption that the trustees are quasi judges. The case of *Ashby v. White*, *Ld. Raym. 938*, is cited and relied upon, as maintaining the same principle. This same case is relied upon, in the case of *Lincoln v. Hopgood*, *11 Mass. 350*, for asserting a directly contrary doctrine. The case is also found in *Smith's Selection of Leading Cases*, *17 Law Library, 82.* On careful examination, it will be found to fail the New York court. It is there said, that the case decides that a man, having a right to vote, can maintain an action against the returning officer for refusing his vote. If the trustees are like judges, and not ministerial officers, then they could not be sued for refusing a vote maliciously. Judges can not be called in question for their decisions, however maliciously they may have acted. And this was the opinion of the judges in *Ashby v. White*, who were opposed to Lord Holt.

2. As to the instructions of the court. I believe they are wrong. There are but three classes of persons—blacks, or negroes, mulattoes, and whites, known to our laws. A black, or negro, is a full-blood African, or one nearer to that than a mulatto; a mulatto is one begotten between a white and a negro, or one nearer to that than to a white; and a white person embraces all which are neither blacks nor mulattoes. Our black law speaks only of blacks, or negroes, and mulattoes; these are prohibited from coming into the state, and from being employed, unless having given security. Persons neither blacks nor mulattoes can come into the state without restriction. The property of blacks and mulattoes is exempted from taxation for school purposes; none but *white* children are permitted to attend school. A person neither a black or mulatto, but having some negro blood, will then be taxed, and his children excluded from the school. The legislature never intended such injustice; they designed to permit the children of all

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**379]** to attend, \*whose property was subject to taxation to raise the school funds.

The question has been decided in Ohio. *Polly Gray v. Ohio*, 4 Ohio, 354. In this case, it was held that Polly Gray, being nearer a white than a mulatto, was a white person, and a negro could not be a witness against her. The same question came before this court on the circuit, in the case of *Williams v. School Directors*, etc., Wright, 578. It was there held, that the children of a white mother, and a father three-quarters white, were white children, and as such, were entitled to attend the public schools. Since these decisions, such persons have been considered white, and have been permitted to vote, and their votes were decided to be legal, in the contested election from Hamilton county, in the session of 1840-41. The only question then is, will the court maintain its own decisions? 1 *Devereux*, 336; *Scott v. Williams*, 1 Hen. & Mumf. 133; *Hudgins v. Wright*, 2 Mumf. 379; 2 *Halstead*, 253; 3 *Ib.* 375.

No argument for the defendants in error came to the hands of the reporter.

LANE, C. J. This case presents the same question as in *Jeffries v. Ankeny et al.*, and must be decided by the same principles. The court charged the jury, that if the plaintiff had any negro blood whatever, he was not a lawful elector. That charge was wrong, and judgment must be reversed.

Judgment reversed.

READ, J., dissenting. I can not concur in the opinion, that any person of less than half black or negro blood, has the right of an elector, under the constitution of Ohio.

The words of the constitution are (art. 4, sec. 1.: "In all elections, all *white* male inhabitants above the age of twenty-one years shall enjoy the right of an elector."

Thus, color is a constitutional qualification of an elector in Ohio, and that instrument confers the enjoyment of the elective **380]** \*franchise upon *white* persons only, and by the force of its terms, excludes all persons who are not *white*.

To hold, therefore, that all persons, less than half black, or less than half negro blood in their veins, have the right of electors

or voters, in the State of Ohio, is in my opinion, a direct and open violation, both of the letter and spirit of the constitution.

The constitution, in defining the color-qualification of an elector, does not employ the phrase—partly white—more white than black—all persons less than half black—but simply the word *white*.

The word “white” means *pure white*, unmixed. The word expresses a simple idea, quality, or principle, homogeneous, not made up or compounded of two different elements or qualities. A mixture of black and white is not *white*; white and black may be mixed in different proportions—they may be more white than black, or more black than white; but a preponderance of the one or the other color will not make the mixture a pure white, or a pure black.

When the words white and black are employed to designate different races of men, they are applied to men of the same blood or stock. When applied to individuals, to designate the stock or race to which they belong, they mean that the individuals, thus designated, are purely of the blood of the white race or the black race. A man of mixed blood, partly white and partly black, can not be called a white man or a black man, because those words import, that the person to whom applied is of pure blood of the white or black race. Nor does it matter about the preponderance of blood, if there be a mixture; he is of the pure blood of neither the one nor of the other. It is not the shade of color, but the purity of the blood, which determines the stock or race to which the individual belongs.

The word *white* has never been applied to persons of any shade of black or negro blood, to contradistinguish them from the full black. In speaking of such, the language is, “he is quarter black,” a “light mulatto,” “nearly white;” always using some qualifying term. To say that a man is a white man, is to affirm that [381 he has no black or negro blood in him; that he is of the pure, unmixed blood of the white race. Such is the meaning which has universally, and at all times, attached to the term “white man.” It is an axiom in the construction of written laws and constitutions, that words are to be taken in their ordinary and common acceptation. The word *white*, then, employed in the constitution, to define the color-qualification of an elector, limits the right of voting to white persons only, and excludes all others. To hold that

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all persons, less than half black, are voters under this clause of the constitution, is to hold that all persons, less than half black, are white. To establish this proposition, the reasoning would stand thus:

White persons are voters under the constitution of Ohio; all persons are white who are less than half black; therefore, persons less than half black, are voters under the constitution of Ohio. Which reasoning proceeds upon the affirmation, that the part is equal to the whole; that more than half is all; that three-fourths white is white; that is, that three-fourths is equal to the whole.

But it is contended that there should be some limit—some certain and fixed rule upon the subject of color. There can be no more certain and definite rule upon the subject than that which the constitution lays down. To say that no person can vote who is not white, is as definite as to say all persons are voters who are less than half black, and of far more easy practical application, because, where it would be easy to determine whether a man had any black blood in him, it might be impossible to determine the exact amount, in persons who were mixed. The whole difference strikes me to be this: that when the constitution has declared one rule upon the subject of color, a majority of this court have declared a totally different rule, destructive of, and repugnant to, the one laid down in the constitution. Whether a man is white or black, is a question of fact; that the white man, only, shall have the right to vote, is a rule of law; and that it may be difficult to determine whether, in a given case, the fact comes within 382] the law, does not impeach the rule of law as uncertain, but only proves that the question of fact is involved in doubt.

The position that all persons, less than half black, are white persons, possessed of the political rights of citizenship, is supported, neither by the examples or authority of other states, nor by the policy or practice of our own, nor by judicial decisions.

It has always been admitted that our political institutions embrace the white population only. Persons of color were not recognized as having any political existence. They had no agency in our political organization, and possess no political rights under it. Two or three of the states form exceptions. The constitutions of fourteen expressly exclude persons of color, by a provision similar to our own; and, in the balance of the states, they are excluded upon the ground, that they were never recognized as a part

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of the body politic. This exclusion extends to all persons of any degree of black or negro blood; and, by the practice of no one of the states, have persons, only less than half black, been treated as white. I have not been able to find any judicial decision to this effect, and presume there is none. Our constitution was formed in view of this practice and prevailing sentiment; and the existence of a like prohibitory clause, respecting color, with our own, forces upon us the conclusion that, with the prohibitory clause, we adopted the construction which it had always received. Such is the construction which, in point of fact, we have always given our constitution; and, in practice, we have always excluded from the right of voting all persons of any degree of negro blood. Indeed, it is matter of history, that the very object of introducing the word *white* into the constitution, by the convention framing that instrument, was to put this question beyond all cavil or doubt, by, in express terms, excluding all persons from the enjoyment of the elective franchise, except persons of pure white blood.

During our territorial organization, although the ordinance and the territorial act, designating the qualification of electors, employed the phraseology, "all free male inhabitants," \*etc., [383 yet no negro, or person of any degree of black blood, was ever permitted to vote. This fact is familiar to the old inhabitants, who resided here during our territorial organization. This phraseology might be subject to doubt; and, although persons of any portion of colored blood were not considered a part of the body politic, it might be construed to embrace them. Hence, to avoid the possibility of such construction, the framers of our constitution extend the phraseology, from "*free* male inhabitants," to "*white* male" inhabitants, and incorporated it into the constitution.

In the convention framing our constitution this question was matter of warm, if not bitter, discussion. A motion was made, on the report of the committee upon this clause, to *strike out the word "white."* Amendments were proposed authorizing blacks and mulattoes residing in the territory to vote and to confer the like privilege upon their descendants; and, finally, in some way to recognize them as citizens by introducing a clause into the constitution excluding blacks and mulattoes from the right of voting, and prohibiting them from holding all office, either civil or mili-

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tary, but conferring upon them all the rights of citizenship not expressly excepted in the constitution. This last proposition, if adopted, would so far have recognized persons of color as citizens, that the legislature could never have enacted laws to remove them from the state; and, employing the term "black and mulatto," might have been construed to confer full political rights upon all persons less than half black or mulatto; although in Kentucky, where blacks and mulattoes are prohibited from political rights, all persons, of any degree of black blood, are held to be mulattoes. (*Journal of Convention framing Constitution of Ohio.*)

Judge Burnet, who is as familiar with the early history of Ohio as any man in the state, and was engaged in the practice of law in the territory, and had been prominently connected with the administration of its public affairs, remarks, in one of his historical letters upon this subject, published in the transactions of the Historical and Philosophical Society of Ohio, vol. 1, pt. 2, p. 111:

384] \* "The result of those discussions was an abandonment of all the propositions which had been made, and a general conviction that a constitution should be formed for the free white population of the district, who, alone, were represented in convention; that its phraseology should be so guarded as to show that people of color were not considered as parties to the compact; and, as they had no agency in its formation, so they should have none in its administration."

The same writer further observes that they were regarded in the position of the aborigines who remained in the state after they had ceded their land to the general government; that they have the moral right, whilst suffered to remain, to claim the protection of our laws, and to be treated with justice and humanity, but, beyond that, they have no claim. Hence, we find, so early as 1804, followed up by another act in 1807, statutes discouraging the immigration of blacks into our state, and imposing upon those among us such conditions and restrictions as would induce a vast majority of them to quit the state. Thus we have denied them all constitutional right to remain even in the state; have passed laws to induce them to leave it, and carefully excluded all persons of any degree of negro blood from all participation in the enjoyment of our political rights. Indeed, the hope always has been cherished, that the time would come when this unfortunate race should be removed from our community, and placed in some position where

they could, among themselves, enjoy their own government, and administer its affairs; or, at least, that Ohio, which is free from slavery, should be rid of a population which, while they remain among us, must be miserable and degraded.

This exclusion of persons of color, or of any degree of colored blood, from all political rights, is not founded upon a mere naked prejudice, but upon natural differences. The two races are placed as wide apart by the hand of nature as *white from black*; and, to break down the barriers, fixed, as it were, by the Creator himself, in a political and social amalgamation, shocks us as something unnatural and wrong. It strikes us as a violation of the laws of nature. It would be productive of no \*good. It would de- [385] grade the white if it could be accomplished without elevating the black. Indeed, if we gather lessons of wisdom from the history of mankind—walk by the light of our experience, or consult the principles of human nature—we shall be convinced that the two races never can live together upon terms of equality and harmony. The distinctions are too marked to be overcome by the power of political action, and the folly of the attempt will probably be only equaled by the fatal consequences of the result. In view of these conclusions, and in this feeling, our constitution was formed, and such views and feelings have always directed the policy of the state. The practical construction which we have given our constitution for a period of more than forty years, has been to exclude all persons of all degrees of black or negro blood from the exercise or enjoyment of all political rights; and such was the practice under the far broader phraseology of our territorial organization. The fact that (under the law excluding blacks and mulatto persons from giving testimony in all cases where white persons are parties) all persons less than mulatto, or half black, have been admitted as witnesses, is no authority against this uniform construction, because all persons of sufficient intelligence, without some positive prohibition, are competent to testify; the Arab, the Hottentot, or anybody else, only that such shall be sworn according to the forms of their own religious belief. Hence, a statute which excludes by name a certain class, shall not be construed to extend to classes not named; for, to carry out such construction, would exclude all persons.

The policy of the state always has been to discourage the immigration and settlement of persons of color among us. The de-

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cision of this court, conferring political rights upon all less than half black, is an inducement for such to immigrate to the state and remain here. It violates the spirit of the constitution, because, in principle, I see no difference in allowing a mulatto to vote, and a person little less than mulatto, or a full black, for the tint of black blood extends to them all, and this is the reason of their exclusion.

386] \*Thus, it appears to me, for the reasons I have assigned, that we are forbidden to give any other construction to the word "white," in our constitution, than that it excludes all persons not of the pure blood of the white race from the enjoyment of the elective franchise, and all participation in the exercise of political rights.

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JAMES C. CHALMERS v. ROBERT STEWART.

A school subscription in aid of the common school fund imposes no obligation to pay, if black children are admitted into the school, or those who are notoriously vicious, corrupt, immoral, or profane.

THIS is a writ of error to the court of common pleas of Greene county.

WOOD, J. The declaration counts on a certain subscription paper, signed by the plaintiff in error and others, the object of which was the employment of the defendant in error to keep a common school in district No. 15, etc., and by which the plaintiff agreed to pay the defendant two dollars per scholar for teaching two scholars for sixty days. The declaration avers that the defendant in error was ready and willing to teach, etc., of which the plaintiff in error had notice, and the refusal of the plaintiff in error to pay, etc.

A plea of the general issue was filed, the cause submitted to the jury, a verdict found for the defendant in error, and judgment rendered thereon, in the court of common pleas, which is now sought to be reversed by the prosecution of this writ.

During the progress of the trial a bill of exceptions was taken, from which it appears that the plaintiff in error offered to prove



to the jury that the defendant in error was employed by the directors of school district No. 15 to teach a common \*school, [387 his salary to be paid in part out of the common school fund, and in part by subscription, and that he had, in violation of his duty and the laws of this state, received into his school divers youths who, he admitted, were colored, and not entitled to the benefits of the common schools of Ohio, but were prohibited by statute, in consequence of which the plaintiff in error withdrew his children from school; which evidence was objected to by the counsel for the defendant in error, and the objection sustained by the court, and this decision is assigned for error.

The inquiry presented is, did the court of common pleas err in the rejection of this evidence? In other words, did it tend to prove any fact that would be a bar to this action?

The school in question was a public school; the subscription was in aid of the common school fund. The defendant in error was employed by the directors of the district to teach a school organized under the statute regulating common schools. Section 51 of this act provides, that all white youth over four and under twenty-one years of age shall be entitled to equal privileges in all the common schools of this state. Swan's Stat. 841. Who white children are, has, in principle, been determined by this court at the present term. *Thacker v. Hawk et al.*

The majority, or predominance of blood, either black or white, carries with it conclusive evidence of the qualifications or disqualifications conferred or imposed by our statutes. By law, white children, only, have the privileges of common schools. A teacher, therefore, can only admit such in a public school, supported in whole or in part by the public funds. If he does admit blacks, he violates the obligation on his part to keep a legal school; and it would be unjust to hold the promisor bound by a contract which the promisee disregarded and omitted to perform.

The bill of exceptions shows that the evidence offered was the direct admission of the defendant in error, that he did receive into the school divers youths, against the provisions of the statute. This evidence a majority of the court think was \*competent, [388 and if the fact was fully established it would have been a bar to a recovery. The common pleas erred, therefore, in arresting this testimony from the jury. In this case, the obligation not to admit blacks is imposed by statute. I have no hesitation, however, in

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laying it down as a general principle, in all cases, that a teacher of a public school is under the implied obligation to regard the morals of the youth intrusted to his care, and, should he so far disregard his duty as to admit the vicious and corrupt, controlled by no sense of moral obligation; should he fill his school with prostitutes or thieves, or those openly profane or licentious, such teacher would forfeit all claim to compensation; and where the statute imposes the prohibition for reasons which were satisfactory to the law-making power as to whom the teacher may admit to the privileges of the school, its enactments, if disregarded, must be followed by the same consequences.

Judgment reversed and cause remanded.

Judge READ did not sit in this case.

ELLSBERRY, for plaintiff in error.

HARLAN, for defendant.

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**389] \*WILLIAM MORGAN v. DANIEL STALEY ET AL.**

The partition of lands incumbered by a dower estate, may be enforced in equity by the owner of the incumbrance, he being also tenant in common of the remainder.

THIS is a bill in chancery, for partition, from the county of Greene.

Daniel Staley died in 1829, intestate, seized of a tract of land, in Greene county; and left, surviving him, a widow and six children. Forty-five acres of the tract were, in 1831, set off to the widow for her dower. In 1839, the complainant purchased the widow's dower estate, and then bought the interest in remainder therein of one of the heirs at law. He now files this bill in chancery against the other tenants in remainder to compel partition.

HOWARD & SMITH, for complainant, contended that the complainant, being the owner of the dower estate, and also of one undivided sixth part of the remainder in fee, he had such an interest as entitled him to have his sixth part set off to him in severalty. They cited Swan's Stat. 614; 3 Prest. on Conveyancing, 89, 90.

GEST & HARLAN, for defendants, insisted that the complainant's

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interest was not such as entitled him, in equity, to have partition. They cited 4 Kent's Com. 271; Co. Lit. 167, a; 9 Cow. 530; Brown v. Brown, 8 N. H. 93; 25 Am. Jurist, 465; Swan's Stat. 617, sec. 13; Thomas' Co. Lit. 805, 830.

BIRCHARD, J. The counsel of the complainant and respondent seem to have different views of the nature of this proceeding. One has treated it as a proceeding in equity, the other as a statutory proceeding. It is, nevertheless, a bill in equity, seeking the exercise of the ordinary powers of a court of chancery; the distinction between which and the powers of a court at law, in matters of partition, is well defined. 1 Story's Eq. 605, 610. The equity jurisdiction, in such cases, is founded in the convenience of the thing, and in the necessity of proceeding, in a tribunal competent to settle all the interests of all the parties with perfect fairness and equality. This may frequently be done under the direction of a master, by special commission issuing out of chancery, much better than on a mere writ. If the titles of parties, says Lord Redesdale, Mitford's Eq. Pl. 120, 121, are in any degree complicated, the difficulties which have occurred at law have led to applications to courts of equity for partition. In this case the complainant has a dower estate, and is in possession of the premises; and is also a tenant, in common with five others, of the estate in remainder. If, on the issue of a writ of partition, at law, the estate should be found incapable of division, without manifest injury to the whole, and the freeholders should return an appraisal of the premises, under the statute, in order to have a sale made, it is manifest that the parties in interest would occupy very unequal grounds, if desirous of purchasing.

The complainant, by a purchase, and uniting of the freehold and remainder, would secure an unincumbered estate of inheritance, while neither of the respondents, nor any other person, could acquire anything but a remainder, incumbered by a dower estate, the duration of which, and all other contingencies incident to such an interest, would be at their hazard. It would be singular, if, under such circumstances, their rights should happen to be so well protected, as to enable them, or the public generally, to enter into fair and equitable competition with the complainant. This view of the case presents an inequality which ought not to be

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*Lessee of Kemper v. Cincinnati, Columbus & Wooster Turnpike Co.*

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overlooked, and, in our estimation, is sufficient to justify a resort to the equity side of the court.

Again, each of the parties to this bill, owns one-sixth part of the remainder; and, if they were all capable of contracting, it is not to be doubted that they might have effected, by agree-  
 391] ment, \*an amicable division, notwithstanding the incumbrance of dower, by means of quitclaims, or other forms of conveyance; and this, for the purpose of enabling the complainant to erect, with safety, permanent buildings, or other fixtures, necessary to the profitable enjoyment of the freehold estate in his possession. The partition is withheld; and, so long as this is the case, we feel no difficulty in entertaining this bill for the purpose of compelling partition. There is still another ground of equity jurisdiction. Three of the respondents are minors, and incapable of contracting or protecting themselves, by bidding, in the event of a sale at law.

In 1 Story's Eq. 611, that learned commentator observes: "Courts of equity will generally follow the analogies of law, but are not to be understood as limiting their jurisdiction to cases cognizable at law, for there is no doubt that they may interfere in cases where a writ of partition would not lie at law." In New York, 8 Johns. 564, the chancellor held that a tenant in common of the inheritance might maintain partition, notwithstanding a dower estate was outstanding. That was a case at law.

Following the analogies of that decision, and of our statute, Swan's Stat. 612, the remainder may, in equity, be partitioned when dower has been assigned. Decree for complainant.

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392] \*THE LESSEE OF PRESLEY KEMPER v. THE CINCINNATI, COLUMBUS AND WOOSTER TURNPIKE COMPANY.

An incorporated road company, which is authorized by its charter to lay out and construct a turnpike road, not exceeding one hundred feet in width. to erect gates and collect toll, has no right to appropriate, for a toll-house land lying without the line of the road.

THIS is a writ of error to the Supreme Court of Hamilton county.

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*Lessee of Kemper v. Cincinnati, Columbus & Wooster Turnpike Co.*

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The defendants are authorized by their charter, to lay out, survey, and make a turnpike road, between certain termini, and to take from the land occupied by said road, when surveyed and located, any stone, gravel, timber, or other necessary materials; and in case sufficient can not be procured on the land located for the road, they are further authorized to enter upon any unimproved lands adjoining, or in its vicinity, and to take so much stone, gravel, or other materials, as may be necessary to construct the road. They are directed to open the road, for a width not exceeding 100 feet, thirty of which shall be made an artificial road. And they are authorized to erect gates on said road, and collect toll, upon compliance with certain requisitions in their charter.

The premises in dispute consisted of a lot of ground, on which a toll-house were erected, outside the strip of ground 100 feet wide. The defendants claimed a right to occupy the ground for a toll-house, by virtue of the powers conferred by their charter. The court below instructed the jury that the charter conferred upon the defendants authority to take and hold the plaintiff's land for this purpose. And the point is raised on this record, whether the right of the defendants to possess the plaintiff's land, extended beyond the land covered by the survey of the road.

CHARLES FOX, for plaintiff in error, insisted that the charter only authorized the company to survey and take so much \*land as is necessary to construct the road 100 feet wide, [393 and that no authority was given for the permanent occupation of the land for any other purpose. That charters should be strictly construed. He cited 9 Pick. 110; 2 Mass. 122; Cooper's Eq. 77; 2 Dows. Parl. 520; 2 Maule & Selwyn, 32.

V. WORTHINGTON, for defendants, maintained that they were authorized, by their charter, to locate a road, erect gates, and collect toll. That, for the exercise of these rights, toll-houses were necessary. They had, therefore, the right to appropriate land for a toll-house, as an incident to the rights expressly granted by their charter. He cited 1 Caine, 179; 10 Johns. 389; 23 Wend. 193; 8 Ohio, 38; 2 Ohio, 112, pt. 2; 4 Ohio, 253; 5 Ohio, 118; 18 Johns. 397; 17 Pick. 434; 12 Conn. 364; 10 Conn. 157; 11 Conn. 467; 2 Johns. 190.

LANE, C. J. A corporation created for any lawful purpose, is

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invested with such powers as are directly conferred, and likewise with such powers as are necessary to execute its lawful functions, and no more. Beyond this, the grant is to be taken strictly.

A turnpike company, being an association formed to accomplish a useful and public object, may lawfully possess powers to occupy another's land, on making due compensation, when necessary to accomplish its end. 5 Ohio, 488; 7 Ohio, 112, pt. 2. The charter, therefore, very properly confers authority to acquire a right to the land for the road, and to the materials lying upon it; and where these are insufficient to construct it, the authority is given to take them from the adjoining unoccupied lands. The right to maintain toll-houses is undoubted; but the right to place them on any other land than that devoted to the road, is not conferred by the express terms of the charter, nor is any necessity shown or believed to exist, for subjecting other property to this purpose.

Judgment reversed.

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**394] \*EDMUND WILCOX AND JONATHAN WELCH v. CHARLES F. KELLOGG, DAVID G. WILLIAMS, MILO G. WILLIAMS, AND ETHEAN S. WILLIAMS, ADMINISTRATORS OF JACOB WILLIAMS, DECEASED, ET AL.**

A transfer by a firm to one partner, bona fide, and by him to a third person in like manner, for valuable consideration, passes both the legal and equitable title to the property, against the creditors of the firm.

The equity of creditors upon partnership property for debts due them, is only the equity of the partners in the property, and can only be reached through the partners.

An absolute transfer of property does not come within the provisions of the act of February 23, 1835, relating to fraudulent assignments.

THIS is a bill in chancery, from the county of Hamilton.

The bill states that, at the February term of the court of common pleas, 1837, the complainants recovered a judgment, at law, against Charles F. Kellogg and David G. Williams, partners in trade, under the firm of Kellogg & Williams, for the sum of \$872.57, besides costs of suit, on a promissory note made by said Kellogg & Williams, due September 4, A. D. 1836; and also for goods sold

by the complainants to said Kellogg & Williams. That an execution issued upon said judgment, and was returned by the sheriff, no goods, chattels, lands, etc., found, whereon to levy, and that said Kellogg & Williams have no property within the reach of execution for the satisfaction of the aforesaid judgment.

The bill further states that, in the month of October, A. D. 1836, and about the time the suit was commenced in which their judgment was obtained, Kellogg & Williams were in possession of a large stock of goods and wearing apparel of different kinds, in a store in Cincinnati, to the value of \$6,000 or \$7,000, debts due them to more than \$2,000, besides other property. About that time, by some agreement between them, Williams took possession of the \*goods, debts, and other property, and exercised the [395 exclusive control, and undertook, with the proceeds of the property, to pay the debts of the firm, and, among others, that of the complainants; that, since that time, the said Williams has converted the goods and wearing apparel into money, either at public or private sale, or placed them in the hands of third persons, for the purpose of covering and concealing them from the complainants, and to prevent them, or the avails, from being applied to the satisfaction of their judgment.

The bill further states that Williams has paid none of the debts of Kellogg and Williams; that he has collected a large portion of the debts of the firm, but applied no part thereof to the payment of complainants' judgment.

It is also averred that Jacob Williams, Albert Kellogg, Thomas Johnson, William Little, and Horace S. Edwards, have in their possession some part of the goods, or the proceeds thereof, held under some agreement with the said David G. Williams and Jacob Williams, or one of them; that after David G. Williams took exclusive possession of the goods, he transferred them, or some part thereof, to the said Jacob Williams, who has since controlled the goods, but for the benefit of the said David G., and which goods ought to be subjected to the satisfaction of complainants' judgment, etc.

The bill prays, among other things, that David G. Williams and Charles F. Kellogg may set forth, specifically, on oath, what amount of goods, clothing, and other property they had at the time the complainants' note fell due, or at any time since, and what disposition they have made of it, and, if sold, to whom, and

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for what consideration; and that the other defendants may, in like manner, answer all and singular the premises charged; prayer for an injunction for satisfaction of complainants' judgment, etc., and for other relief.

To this bill David G. Williams and Jacob Williams have answered fully, and their answers substantially agree. All fraud is denied. From these sources, it is in proof, that when David G. Williams went into the firm with Kellogg, he, Williams, furnished 396] all the capital then advanced, except about \*\$400, which was advanced by Kellogg. That in order to raise the necessary funds to commence business, by the purchase of goods, Jacob Williams, the father of said David G., and his father in law, Phillips, indorsed his note to the Ohio Life Insurance and Trust Company, for \$550. He had \$600, and, with these sums, Kellogg proceeded to the east and purchased \$3,000 worth of goods, about one-half on a credit of six and twelve months. After five months it became necessary to make new purchases; the business had not been profitable, but the said David G. Williams relied on the assurances of Kellogg that it would become so; and, to keep up the credit of the firm, and to pay off the bills given at six months, the said David G. borrowed of Jacob Williams, his father, \$1,000, on January 29, A. D. 1836. Kellogg again went east, bought \$4,000 worth of goods, at six months' credit. The purchases were too large, business dull, and the said David G. was convinced the debts could not be paid from the business of the firm. He therefore took the property with the intention of closing the concern for the benefit of the creditors in good faith. He received of the firm \$5,000 in goods, and \$1,500 in book accounts, and repaid Kellogg \$400, advanced by him, and \$150 for his services. The said David G. then wrote to all the creditors in the east advising them of his apprehensions that their debts would not be met as soon as due, and asking further time, or offering to surrender the goods. His offer was declined by all except the complainants, who did not answer his letter. The said David G. then formed a partnership with Isaac Stokes, but it was unsuccessful; he was taken sick, and, when he recovered, he found the stock much reduced, and nothing on the books. He then determined to break up the concern, and transfer the goods to those who had advanced almost the entire capital, and accordingly did so.

He was indebted to said Jacob Williams, besides the \$1,000 bor-



rowed of him, for \$224, \*before that time advanced to him, and [397 \$400 due on the note to the Life Insurance and Trust Company, paid or assumed by the said Jacob, in the whole, including interest, \$1,627; also, in the further sum of \$409 on a note discounted at the Franklin Bank of Cincinnati, and used by said David G., and paid by said Jacob. He therefore transferred the goods to said Jacob, on December 11, A. D. 1836, for his benefit, and, if anything remained, for other creditors, with no understanding nor belief that any part of the avails was to be returned to him. The goods were all sold by auctioneers, in Cincinnati, gradually, not forcing them into the market; and, after paying expenses, there is a balance still due to Jacob Williams from the said David G., of at least fifty or sixty dollars.

Many of the allegations, and much of the proof, is omitted, not being, in the opinion of the court, essential to be considered, in order to correctly dispose of the case.

The case was argued by WRIGHT & HODGES, for the complainants, who cited *Root v. French*, 13 Wend. 570; *Coddington v. Bay*, 20 Johns. 651; *Bay v. Coddington*, 5 Johns. Ch. 54; 33 Ohio L. 13.

V. WORTHINGTON, for defendants, cited *Story* on Part. 508; *Hoxie v. Carr*, 1 Sumn. 181; *Phillips v. Cook*, 25 Wend. 399; *Ex parte Ruffin*, 6 Ves. 119; 11 Ves. 3; 17 Ves. 514, 2 Ves. & Bea. 172.

The discussion being chiefly as to the question of *fraud*, is omitted.

WOOD, J. It is contended by the complainants, that the whole proofs disclose a fraudulent attempt to place this property beyond the reach of creditors. If so, the complainants are entitled to relief. The law, says Mr. Justice Wilmot, breaks through all the forms with which fraud may surround itself, and exposes it, odious and hateful, to the public gaze. \*At law, however, it has [398 become a truism, that fraud *must be proved*. In equity, it is sometimes said, the rule is not so strict, but it is nevertheless certain that the evidence of facts and circumstances must be such that it can *reasonably* be inferred, or else, in legal parlance, it does not exist.

The substantial facts relied upon in the case at bar, by which fraud is attempted to be fixed upon the transaction, are:

1. The ties of blood between David G. and Jacob Williams.

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2. That David G. transferred the property, about the time he had reason to suppose the debts of the firm of Kellogg & Williams would be pressed for collection.

3. That he wrote to the eastern creditors, requesting time for payment, which, it may be claimed, was a device to put them off their guard, until he could dispose of the property.

4. That an amount much larger than the debt due to Jacob Williams was transferred to him.

5. That it was sold at *auction* to pay this debt.

It is recognized as a suspicious circumstance, when a debtor, in failing circumstances, passes his whole property into the possession of his near relations; but in this case, the consideration is proved to have been *bona fide*, beyond dispute, over \$2,000 cash advanced. This transfer was legal, if honest, at any time before the law had taken the property into its custody, whatever might be the circumstances of David G. Williams. In writing to the eastern creditors for time, the letters show he offered to *surrender the property*, if the creditors desired it, but they declined. The amount transferred was directed to be sold gradually, at auction, not forced, and did not bring sufficient to pay the debt; and in cities, the auctioneer is a convenient and proper channel through whom property of this description will frequently sell to the best advantage.

We do not, therefore, after the most mature deliberation, find evidence sufficient to declare this transaction fraudulent.

It is contended, however, that the complainants being creditors of the firm of Kellogg & Williams, the debts of which 399] \*firm Williams had assumed to pay, they had a lien upon the partnership property, into whosoever hands it might pass, which might be enforced in equity. Is this so? It is laid down in Story on Part., sec. 358, that while the partnership is solvent and going on, creditors have no equity against the effects of the partnership; neither have they any lien on the partnership effects for their debts. There being no lien, and no equity in favor of creditors against partnership effects, it follows they are susceptible of being legally transferred *bona fide*, for a valuable consideration, to any persons whatever, and as well to other partners as mere strangers. The equity of *creditors* upon partnership property is, when sifted, as laid down in the books, only the equity of the *partners*, and can only be reached or worked out, as it is said, through

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them. It appears to me, then, clearly, if these goods passed, on the dissolution of the partnership of Kellogg and Williams, to David G. Williams, *bona fide*, and for a valuable consideration, from him again, to Williams and Stokes, and from them to David G. Williams, and thence to Jacob Williams, in the same *bona fide* manner and for a like consideration, they are beyond the reach of the complainants.

But it is said, the transfer to Jacob Williams is fraudulent, under the act of February 23, A. D. 1835, being an *assignment in trust*. But this is clearly not so. It is an absolute conveyance to pay Jacob Williams his debt, and is not, therefore, within the provisions of that act. Bill dismissed.

## \*ROBERT S. HALLECK v. THE STATE OF OHIO. [400]

In an indictment for perjury it is sufficient to aver that the court had power to administer the oath, without setting forth the facts necessary to give jurisdiction.

When it became material to prove the contents of a book of accounts, which had been admitted by the accused to be correct and true, the book may go to the jury as evidence of the extent and nature of the admission.

THIS is a writ of error to the court of common pleas of Ashtabula county.

The case was this: Complaint had been made by the plaintiff in error before Crosby, a justice of the peace, against Abijah Southwick for perjury. On the hearing of this complaint, the plaintiff in error was examined on oath as a witness. In the course of examination, it became a material question, whether a note for \$17.38 had been given by Southwick to Halleck on a settlement between them. Halleck, the plaintiff in error, stated on oath, as a witness, that a note, for that amount, had been given him by Southwick, on a settlement, in June or July; but that the note was mislaid or lost. Halleck was then indicted for perjury in the above statement.

The indictment sets forth that complaint had been made by the plaintiff in error, in due form of law, before Crosby, a justice of the peace, against one Southwick, for perjury.

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After setting forth the appearance of Southwick to answer this complaint, the indictment then avers, that, "thereupon, the said David Crosby, as such justice, as aforesaid, proceeded to hear and determine the matter of said complaint, in the presence of said Abijah Southwick, and at, and upon the said hearing, of the said matter of said complaint, by the said David Crosby, as such justice of the peace as aforesaid, the said Robert S. Halleck, of said township of Saybrook, in the county of Ashtabula aforesaid, appeared as a witness, in support of said complaint, to, and before the said David Crosby, Esq., such justice of the peace, and then 401] and there as such witness, \*by, and before the said David Crosby, Esq., such justice of the peace, as aforesaid, was, in due form of law, sworn by the said David Crosby, to testify the truth, the whole truth, and nothing but the truth, relative to the complaint aforesaid, then and there in hearing, before the said justice, *he, the said David Crosby, Esq., then and there having sufficient and competent authority to administer an oath to the said Robert S. Halleck, in that behalf.*"

The indictment then proceeds to aver the materiality of Halleck's testimony relative to the note given him by Southwick, on settlement, and, setting forth his statement in relation thereto, negatives his testimony with the usual averments.

The evidence on the trial to which the plaintiff excepted, is set forth in the opinion of the court.

WADE & RANNEY, for the plaintiff in error, contended :

That the indictment should show a cause depending, in which the oath was administered, and that the court had jurisdiction of the cause. 2 Russell on Crimes, 520; Bullock v. Coon, 9 Cowen, 31; 1 Chitty's Crim. Law, 188; Stevenson v. The State, 6 Yerger 531; State v. Ammon, 3 Murph. 126; Shaffer v. Kinton, 1 Binn. 537; Vansteenburgh v. Kortz, 10 Johns. 167; Rex v. Cohen, 1 Stark. 511; Starkie's Crim. Pleading, 124.

That to give the magistrate jurisdiction, the complaint should have been made by affidavit, in writing. Swan's Stat. 537. That as the indictment does not aver the complaint to have been in writing, the magistrate does not appear to have had jurisdiction of the cause in which the plaintiff in error was sworn; but the proceedings, so far as appears from the indictment, were, therefore, *coram non judice*.

That the averment of the proceedings being in due form of law,

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and of the magistrate having sufficient and competent authority to administer the oath, is merely a conclusion drawn by the pleader; but the facts, to establish the correctness of that conclusion, should be averred.

\*They also insisted that the book of accounts, containing [402 the settlement between Southwick and Halleck, was improperly admitted.

No argument was submitted on the part of the state.

BIRCHARD, J. This case presents two questions. One of evidence, and the other as to the sufficiency of the indictment. It appears from the record that the plaintiff was indicted and tried for perjury in testifying, before one Crosby, a justice of the peace, on a complaint pending before him, against one Southwick; that said Southwick had previously executed to him, on a settlement of accounts, a promissory note for the payment of \$17.38. The bill of exception shows that on the trial of this cause, Southwick was introduced as a witness, and produced his book of accounts, and testified that it contained a true and just account of his charges against the plaintiff, and also of the credits which he had given him; that plaintiff and the witness had settled said account, and that, on such settlement, the witness read over such accounts to the plaintiff, who acknowledged them to be just and true; and further, that he, the witness, had never given to the plaintiff the note of \$17.38 mentioned in the indictment. The bill also shows that another witness testified, that he was present at said settlement, when Southwick read from his account the items of debt and credit, and that the plaintiff acknowledged the same to be correct. After further evidence had been introduced, the prosecutor, in the progress of the cause, offered in evidence to the jury the book of accounts, and it was admitted by the court, notwithstanding the objections of the plaintiff.

Was this book of accounts improperly admitted? Counsel urge that it was, inasmuch as it was not within the custody or control of the plaintiff, and, that if it contained facts material for the state to prove, it could only be referred to by the witness, to refresh his memory. It seems to us that the court did not err in permitting the book to go to the jury. The material \*question was, [403 whether or not, on the settlement of that account, Southwick gave to the plaintiff a note of \$17.38. The proof, by two witnesses,

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showed, that this book contained evidence of the items adjusted at that settlement, and that its correctness was, at that time, admitted by plaintiff. There can be no question but that the admissions of the plaintiff were legal evidence against him. This book of accounts, whether kept by him or another, whether within or beyond his control, was the best evidence of its own contents, and better evidence of the extent and particulars of the items therein contained, and admitted by plaintiff to be just and correct, than the recollection of any person. So far, then, as the book of account showed items which had been admitted and settled by the parties, and tended to enable the jury to ascertain the actual debits and credits, and of the sum then due to either party, it became, under the state of the proof, competent testimony; not merely because it was a book of account, but because it contained written evidence of what the parties themselves had done, and of what the plaintiff had then said was just and true.

The objection to the indictment is, that it does not show that Crosby, before whom the perjury is alleged to have been committed, had any jurisdiction to administer the oath, inasmuch as it does not set forth that a complaint, in writing, on oath or affirmation, was made before him. The indictment charges that the plaintiff's offense was committed before David Crosby, a justice of the peace for Saybrook, in the county of Ashtabula; and, it avers that said Crosby had full power and authority to administer the oath; that it was taken on the hearing of a complaint against said Southwick, for perjury, which complaint had been made in due form of law, and was then on hearing before said Crosby, as such justice. It may be admitted that this general form of allegation would be bad, by the rules of common law, without it necessarily following that the court of common pleas erred in refusing to arrest judgment in this case, for, by recurring to section 11 of the act providing for the punishment of crimes, Swan's Stat. 231, it will be seen that, in this state, the common law has been 404] \*modified by express legislation. Section 11 provides "that, in an indictment for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and before what court or authority the oath or affirmation was taken, averring such court or authority to have had full power to administer the same, without setting forth any part of any record or proceeding, in law or equity," etc.

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A careful comparison of this indictment with the section of this statute (parts of which I have given) will convince the mind that it contains all the averments which our statute requires, and that the court of common pleas could not have pronounced it defective without disregarding the law, and requiring of the prosecutor something beyond what it had made sufficient. Motion overruled and cause remanded for judgment.

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## ISAAC VANVALKENBURG v. The STATE OF OHIO.

Proof of uttering and publishing counterfeit bank notes as true and genuine, will not sustain an indictment under section 29 of the statute for selling and bartering such notes.

THIS is a writ of error to the court of common pleas of Cuyahoga county.

The plaintiff in error was indicted under section 29 of the act providing for the punishment of crimes, Swan's Stat. 236, for "selling, bartering, and disposing of two certain counterfeit bank notes to one Seth Goodwin."

The proof was that the counterfeit notes were passed to Goodwin, as true and genuine bills, in exchange for other bank paper. The exchange was made by plaintiff, under pretense of accommodating Goodwin, as an old customer, and without charge. On the trial, the court was asked to charge the jury, \*that, if [405 they found, from the testimony, that the notes were passed, uttered, or published, as true and genuine, with intent to defraud Goodwin, the prisoner could not be convicted under this indictment. The court refusing so to charge, a bill of exceptions was taken, and this refusal is assigned for error.

Other errors were assigned on the record, in relation to the jurisdiction of the court, which, as the case is disposed of on other grounds, are omitted.

J. ADAMS and C. STETSON, for plaintiff in error.

F. T. BACKUS, for the state.

READ, J. It is a clear principle of law that you can not indict

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a man for one crime and convict him of an offense wholly different from that laid in the indictment. The allegations and the proof must correspond in criminal as well as in civil cases.

It is a well-settled rule of criminal proceedings that, in all statutory offenses, the indictment must pursue the words of the statute substantially in setting out the offense. With us there is no such thing as common-law crimes. The prisoner was indicted for selling and bartering counterfeit bank notes, under section 29 of the act punishing crimes. The proof shows that he uttered and published them as true and genuine, with intent to defraud, which is an offense punishable under section 22 of the same act. Swan's Stat. 233.

A majority of the court are very clear in the opinion that an indictment, under section 29, for selling, bartering, etc., will not warrant a conviction of the offense specified in section 22 of the act.

The offenses are certainly not identical, or else the legislature performed a work of supererogation in creating them both. The one embraces the case of uttering and passing, as true and genuine, spurious and counterfeit paper, knowing it to be such, 406] with intent to defraud. The other is where a person \*sells, barters, or disposes of spurious bills, as such, not as true and genuine, and without any intent to defraud. In the latter it was designed to punish a person who kept and sold, or disposed of counterfeit bills, to willing purchasers and receivers, who well understood the character of the articles purchased. One section punishes the person who vends the counterfeit bills to such as wish to purchase the article. The other punishes him who passes them as genuine money, or bank notes, with intent to defraud. Guilty traffic is the essence of one, but of the other, an intent to defraud.

The words of the statute, describing the offenses, are very different, being in the one, "utter and publish, *as true and genuine*;" in the other, "to sell, barter, or in any manner to dispose of;" the legislature have thus defined different offenses, and in different words.

The rules of criminal pleading require the offense to be set out substantially in the words of the statute. The statute contains a definition of the offense. Now, if under an indictment for one offense, you may convict of a distinct and different offense, it would



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bring us to this legal conclusion : That you could have a common indictment under which a conviction could be had for every variety of offense. But can this conviction be sustained upon the principle that the greater offense includes the less? It is true that where, to the same act, the law attaches different degrees of criminality, according to the motives and circumstances under which it was performed, an indictment for the highest degree of criminality will authorize under it a conviction for any less degree. As an indictment for murder in the first degree will sustain a conviction for murder in the second, or manslaughter, so upon an indictment for an assault with an intent to murder, there may be a conviction for the assault only. But this is not the case where the offenses complained of are distinct.

According to the theory of criminal pleading, no one definition of a crime, in an indictment, can contain two distinct offenses, so as to warrant a conviction for either, any more than \*by the [407 laws of matter, two bodies can occupy the same space at the same time. Judgment reversed.

BIRCHARD, J., dissenting. I am not able to concur in the decision just announced :

1. Because I know of no authority against the correctness of the decision of the court below, and, in the limited research which I have been enabled to make for such authority, I have discovered well-considered cases, which, in my judgment, will sustain it. 15 Mass. 187 ; 7 Conn. 54 ; 9 Conn. 259, and cases there cited.

2. The indictment charged, upon the plaintiff in error, the offense of bartering counterfeit paper, knowing it to be such. The statute defines such an offense. The proof established the facts of the guilty knowledge, and the bartering of the paper, by swapping it for Ohio paper, worth, nominally, a less sum in market. This fully made a case of crime, as defined by the statute, and the proof sustained all the allegations of the indictment. I can not, in the absence of any authority, and against strong authority, hold that there is any legal principle which would enable a defendant, on trial for such a crime, to defeat the state, by proving, in addition to the facts established against him, that he also intended to defraud his victim. It would have been proving his innocence by establishing a greater degree of moral turpitude, on his part, than that which was alleged against him. It would be like allowing

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one indicted for larceny to escape punishment, by proving, that, when he stole, he also committed a burglary or robbery; or, one indicted for an attempt to commit a rape, to show that he did not make any such attempt, by establishing the fact, that he not only made the attempt, but was actually successful in the perpetration of the crime. The case cited from 7 Conn. 54, is in point. The statutes of that state define a rape, and an attempt to commit one, as two distinct and separate offenses; and, however illogical it may seem to others, the Supreme Court of Connecticut held, 408] proof of an actual rape committed \*carried with it proof of the attempt to commit the offense; and that conviction or acquittal of the latter was a bar to any future prosecution for the former. The books appear to me to sustain them. 1 Hale P. C. 246; 4 Co. 46, b; 15 Mass. 187; 1 Leach Crown Law, 36, 88; 2 East P. C. 560; 2 Hale P. C. 302.

As I understand the law, the rule is, that in cases where an indictment is fully sustained by the facts in proof, and the facts also disclose that the defendant might, with propriety, have been indicted for a graver offense, it is discretionary with the court to allow a *noll. pros.*, and to discharge the jury, in order to prevent the trial from barring a future prosecution, for the more aggravated offense. 1 Chit. Crim. Law, 637.

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JOHN P. FOOTE v. THE CITY OF CINCINNATI.

The amendment to the city charter of Cincinnati, passed March 12, 1838, has never been duly accepted.

The liability of a lessee to pay rent subsists, notwithstanding the leasehold has been appropriated for a street, and he is entitled to a compensation from the city for this liability.

LANE, C. J. This case presents a motion, by the plaintiff, for judgment on a verdict, and a motion, from the defendant, for a new trial.

In 1837, Foote leased certain tenements from Longworth, for five years, at the annual ground rent of \$300. In 1838, the city extended Pearl street, and occupied the whole land leased. This

suit is brought by Foote, to recover damages for this appropriation of his property. The jury, under the direction of the court, have assessed his damages at \$3,860.10, if by law, he is released from the payment of his rent; but if his liability subsists to pay rent for the residue of his term, they estimate his damages at \$5,201.76.

\*The questions arising are, whether the plaintiff shows a [409 right to recover in a suit at law, without averring by his declaration that he has attempted to get his compensation in the form prescribed by the charter and city ordinances, and if such recovery may be had, for what sum he is permitted to take judgment.

In March, 1838, an act was passed amending the city charter, and authorizing the council to open streets, ascertain damages, and provide for their adjustment. In May, 1838, an ordinance was made to carry this act into effect. The defendants insist that the plaintiff must show, by pleading, an attempt to obtain his compensation by the provisions of this ordinance, before recovery.

But the amendatory act was to be of no force *until adopted "by a majority of the voters of the city."* Section 8 of the act provides "that the qualified voters of said city are hereby authorized, at the time and place of holding their annual election in April next, to vote by ballot for or against this act becoming a part of the charter of said city; and at such election it shall be lawful for said qualified voters to indorse on their tickets, 'yea,' or 'nay,' which tickets shall be received by the trustees of said city, who shall act as judges of said election and make returns thereof to the mayor of said city, at his office, in the same manner that returns of the election of city officers are required to be made by the act to which this is an amendment." 36 Ohio L. 242. To obtain this acceptance, the council requested the qualified voters of the city to vote on this question at the *township* polls. Now this vote may justly be held void, for although the territorial limits of the city and the township are the same, they constitute different political organizations; the elections are holden before different officers, and the voters composing the two corporations possess different qualifications. The plain intention of the legislature was to present the question of acceptance to the voters of the city at some regular city election; and a request to vote at an election held for a different purpose, and \*in a different municipal [410 organization, is no fair compliance with the law.

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But the objection is capable of a different and conclusive answer. Unless the law by which the defendant's property is taken for a public use provides him a compensation, it is void. *McArthur v. Kelly* and others, 5 Ohio, 143; 2 Kent's Com. 339.

This charter does not attempt to afford compensation to any except to the owners who hold freeholds, or renewable leaseholds of ninety-nine years, leaving shorter interests, like the plaintiff's, entirely without protection. There can, therefore, be no obligation on him to appeal to a law which affords him no remedy; and the case of *Hickox v. City of Cleveland*, 8 Ohio, 543, renders no such recurrence necessary. His right, then, to the common forms of justice is unimpaired, and he may well sustain the present suit.

The jury having found the alternative damages, it only remains for us to determine for which sum he may take judgment. If his liability to pay rent to his landlord subsists after this appropriation of his property to a public use, his compensation should cover such rent; but if his rent is extinguished by such occupation, he is entitled to no indemnity. We are referred to *Gillespie v. Thomas*, 15 Wend. 464, as an authority to show that the rent is discharged. We find the court adjudicating upon the proceedings of street commissioners in New York, exercising special statutory powers, who have all parties, both landlords and tenants, before them, and who adjust all interests and satisfy all damages. The proceedings of such a tribunal, by whom the landlord obtains a compensation for his rent, involves a discharge of the lessee. But this case does not touch the general principle that the right of eminent domain, or the right of appropriating land to public uses, is no proper technical incumbrance on the land, and that such appropriation is no eviction. *Folts v. Huntley*, 7 Wend. 211; *Elisha Parks v. City of Boston*, 15 Pick. 198. The rights of the parties, therefore, are unaffected by those rights. The tenant's liability to pay rent to 411] his landlord \*continues unimpaired, and he is entitled to a compensation to include the largest sum.

Judgment for plaintiff.

CHARLES FOX, for plaintiff.

EDWARD WOODRUFF, for defendant.

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Belknap v. Cram et al.

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IRA BELKNAP v. JOHN O. CRAM, NEHEMIAH G. ABBOTT, JOHN MISER, JOHN W. THOMPSON, GEORGE JAMES, ET AL.

Joint property will, in equity, be subjected to the payment of partnership debts.

Notes given by one member of a firm to his partners, on its dissolution become their individual property, and, in the possession of their assignee, can not be subjected to pay the creditors of the firm.

THIS is a bill in chancery, from Muskingum county.

The material facts upon which the cause was decided, are set forth in the opinion of the court.

GODDARD & CONVERSE, for complainant.

H. STANBERY and GEORGE JAMES, for defendants.

As some important principles discussed by counsel were not decided, nor the case finally disposed of, the arguments are omitted.

WOOD, J. The facts in this case appear to be these: The complainant became the surety of Miser, Thompson & Co., which firm was composed of Miser, Thompson, Abbott, and Cram. This firm was dissolved, and Miser, who bought out [412 Thompson, gave Abbott and Cram notes, secured, for \$4,000, and became obligated to pay the partnership debts, and all the partnership effects were transferred to him. At the date of the dissolution, and when the arrangement was completed, the assets of the firm of Miser, Thompson & Co. were amply sufficient to pay all the partnership debts. Miser afterward squandered the partnership property, and Abbott and Cram became insolvent, and assigned the notes for \$4,000 to the respondent, James, as a trustee, to pay certain separate debts of theirs, previously contracted in the city of New York. At the time of this assignment, these New York debts were in the hands of James and others, as attorneys, for collection, and Abbott and Cram being pressed for payment, the assignment was made in consideration of an extension of time, and Miser's notes collected and the money partially in the hands of James to be applied in payment of the New York debts. The trustee is charged with notice, at the time of the assignment, of the circumstances under which it was made.

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The object of the suit is to subject the avails of these notes, in the hands of James, to the payment of the demand on which the complainant was surety for Miser, Thompson & Co., on the principle which is familiar in the law of partnerships, that the joint property must be applied to pay the joint debts of the firm. While the rule is admitted, its application to this case by no means follows. The whole transaction, on the part of Abbott and Cram, and the trustee, appears to have been conducted in good faith, and the consideration for the transfer of the notes, such as the law will support. A creditor of the firm can not, under any circumstances, reach the joint property, in case of a transfer in discharge of a separate debt. While the members of a partnership, as between themselves, have a *lien* which they may directly enforce, by the application of the joint property to liquidate the joint debts, a creditor of the firm has no such lien on its effects. He has, it is said, in the books, something which approaches a lien, but it can not be enforced except through the 413] partners themselves. Nor while the partnership is solvent and going on, have the creditors any equity, strictly speaking, against the effects of the partnership. All they can do is to proceed, by action at law, against the partners. 6 Ves. Ch. 119; 11 Ves. Ch. 3; 2 Swanst. Ch. 552. There being then, says Mr. Justice Story, in his Law of Partnership, page 510, no lien and no equity, until the levy of an execution, it follows that the partnership effects may be legally transferred, *bona fide*, for a valuable consideration, to any persons whomsoever, and as well to the other partners as to strangers—as was decided at this term, in the case of Wilcox et al. v. Williams et al.

It seems to us, therefore, to be clear, that at the time of the dissolution of this firm, admitting for the present, that the notes transferred to Abbott and Cram were partnership assets, that they vested in them as their individual property, and were transferred by Abbott and Cram, and *legally vested* in the respondent James. If this be not so, there is no safety in a creditor receiving payment of a separate debt, even with the assent of the firm, however solvent; but his security can only depend upon its continued prosperity.

But it is not clear that these notes of Miser's were partnership property. On the other hand, it is evident, to my mind, they were not. They were executed by Miser on the dissolution of the

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partnership; they were the individual notes of Miser and his securities, and were delivered to Abbott and Cram, and were never the property nor in the control of the firm of Miser, Thompson & Co., for whom the complainant was surety, and he can have no claim to reach them in equity. Joint property, says Judge Story, is that in which the partners have a joint interest, at the time of the dissolution, either in law or equity. Story on Part. 528.

There are other principles involved in this case, but it was reserved here to determine the one disposed of only. The injunction is dissolved as to James and the New York creditors, and the case may be remanded to the county for further hearing as to other parties, and for final decree.

Injunction dissolved and cause remanded.

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\*STILES R. FOX v. JOSIAH HART.

[414]

The public right to a highway may be lost by non-user.

But where there has been a continued use of such highway, although its width had been encroached upon by the adjacent owner for eighteen years, the right is not lost.

The supervisor may open such road to its full width.

THIS was a writ of error to the court of common pleas of Washington county.

The original action was trespass, in which a verdict was rendered for the defendant.

On the trial, a bill of exceptions was taken which showed that the plaintiff, "having proved an actual possession in himself of the close mentioned in his declaration, and an inclosure thereof, by a rail fence, and further offered evidence to prove the trespasses alleged to have been committed therein by the defendant, and the damages thereby, rested his case; and thereupon the defendant proved that he was supervisor of road district No. 6, in the township of Waterford, in the year 1838, and at the time of the alleged trespass, and that a certain road, running by the plaintiff's close, was a part of, and within his district; and further

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offered, and gave in evidence, the plat and record of a road four rods wide (running along the bank of Wolf creek, parallel with plaintiff's close), surveyed and established by order of the court of quarter sessions of said county, in the year 1794; and, further, offered evidence tending to prove that the fence of the plaintiff was within the line or width of the said road, as surveyed and platted, four rods wide, as above stated; and that the defendant, as such supervisor, committed the alleged trespass, in abating the fence of the plaintiff, along and parallel to said road, as the same has been used and traveled by the public, and in entering upon the close of the plaintiff to the line of said road, as surveyed, in the year 1794.

415] \*"And thereupon the plaintiff, to rebut the said evidence, on the part of the defendant, proved by witnesses, that the said road, as the same had been actually opened, used, and traveled by the public, to the said *line*, claimed by the said defendant, and to which he had so entered upon the close of the plaintiff, and opened the said road. Evidence was also given by the defendant, tending to prove that seventeen or eighteen years ago, the grantor of the plaintiff, and then owner of the close, moved his fence several feet into the said highway, and into a part thereof, which prior to that time had been used by the public as a road; but the defendant, in doing the acts complained of, not only moved that fence, but also other fences which stood within the established line of the road, but not within any part of the road which had been used by the public. It was also proved that, by the action of the water of Wolf creek, the road, as traveled by the public, had in some places become inconveniently narrow; and the plaintiff asked the court to charge the jury, that if they should find, upon the evidence, that the said road was laid out forty years ago, along the bank of the creek, and had been opened and used during all that time, at a width less than the law required the road to be laid out, then, that the supervisor, the defendant, was not authorized to enter upon the adjoining close, and open said road to the width required by the law in force at the time of its establishment; which instruction the court refused to give; to which refusal of the court, so to instruct the jury, the plaintiff, by his counsel, excepted."

The errors assigned are:

1. That the court of common pleas erred in refusing the instruc-



tion to the jury, asked for by the plaintiff, in the trial of the said cause in said court, stated in the bill of exceptions.

2. That the judgment of the court of common pleas, was given for the defendant, when, by the law, etc., the same should have been given for the plaintiff, etc.

\*BIRCHARD, J. This case was supposed to present the ques- [416  
tion, whether the public right to a road is lost, by the encroachments of an adjacent owner for the period of twenty-one years. We think, however, it may be disposed of without deciding that point. The bill of exceptions does not show an actual adverse possession, by any person for a period of twenty-one years; and therefore the question, whether the public right can be barred by our statute of limitations, does not necessarily arise. Whether the maxim, "*nullum tempus occurrit regi*," is applicable or not to a highway, should be left to be determined when, by a proper case, it is required.

As the road was laid out in 1794, and a part of its width only was used up to the period when the defendant found it necessary to open it to its full width, it is claimed that the public right to that part, which so remained unoccupied, was lost by non-user.

It is not doubted that a right to a highway may be so lost. The law would raise a presumption of an extinguishment of the right, when the road had been abandoned for a long period.

But this record shows a continued use of the part of the road left open, and there is nothing to authorize the presumption, that any portion of it had been abandoned or would not be occupied as soon as the public convenience should require. The encroachments of the creek, at the time the transaction complained of occurred, rendered it necessary that the full width of sixty feet should be thrown open. The public had been deprived of a part of the original road for about eighteen years previous, by the encroachments of the adjacent owner. He had no reason to suppose such portion was lost by this encroachment, or the right to it in anywise impaired, nor was it so lost or impaired. The supervisor performed no more than his duty in opening it, and the court of common pleas did right in sustaining him.

Judgment affirmed.

ARIUS NYE, for plaintiff.

GODDARD & CONVERSE, for defendant.

## 417] \*JEREMIAH SHELTON ET AL. v. JOSEPH GILL ET AL.

To enjoin a judgment at law, on the ground of illegal interest, the bill must show a tender of the amount equitably due.

Illegal interest paid, can not be recovered back.

A stipulation in a warrant of attorney to pay collection fees, in addition to the principal debt and interest, is against public policy and void.

THIS is a bill of chancery, from the county of Pike.

The bill is filed by the complainants, setting forth a loan of money from the respondent, Joseph Gill, at a rate of interest of ten and twelve per centum per annum, and which the answer shows, from time to time, liquidated and paid, as the time was extended for the payment of the original loan. The loan was \$4,500, for which a bond was executed, with a warrant of attorney to confess a judgment for the amount due, with two and a half per centum, as attorney's fees, for collection, and on which judgment was rendered for the balance due, nearly \$5,000, with two and a half per centum, collecting fee. Execution was issued, and levied on the complainants' property.

An injunction was allowed on this bill, and the respondent restrained from the collection of this judgment; and the complainants pray that an account may be taken of the loan, the amount of interest paid, and the attorney's fees, and that the respondent be decreed to credit, on the execution, all excess over six per centum, and the attorney's fees, for which judgment was taken, and for other relief. Gill answered, and the above allegations are substantially admitted.

CREIGHTON, GREENE & HUNTER, for complainants, contended :

That the defendant was entitled to no more than the principal loaned, with legal interest. *Bank of Chillicothe v. Swayne et al.*, 418] 8 Ohio, 257. And, having obtained judgment on \*the warrant for a larger amount, a court of chancery should restrain the collection, beyond what was justly due, for principal and interest. That the two and a half per centum, included in the judgment, was clearly illegal, and was so decided, in the *State of Ohio v. Taylor and others*, 10 Ohio, 378.

That the defendant having answered, admitting the allegations

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of the bill, he waived his right to object to the relief claimed, and should have demurred. *Rees v. Smith*, 1 Ohio, 124. A tender of the amount due is not necessary.

LE GRAND BYINGTON, for defendant :

The bill must be dismissed, because :

1. Upon its own showing, the complainants could have adequate remedy at law, by defense to the action before judgment, and, even after judgment, by having it set aside. *Critchfield v. Porter*, 3 Ohio, 518; *The Bank of Mount Pleasant v. McKee*, 7 Ohio, 175.

2. A large amount is admitted to be justly due, which is not tendered, and therefore the complainants have not placed themselves in a position to demand relief.

3. The interest, claimed to be illegal, was voluntarily paid, with a full understanding of the contract, and, being paid, can not be recovered back.

Wood, J. Are the complainants entitled to relief? It seems to us, upon one of the most familiar maxims of equity jurisprudence, the complainants make no case. He who seeks equity, must do equity. The complainants, in this bill, have no averment that they have offered to pay the amount which is admitted to be due, nor do they bring such money into court. Without this allegation, there is no pretense for sustaining this bill. In the many cases of this character, which have been adjudicated upon the circuit within the last few years, not one is within our recollection in which the bill has not contained this averment, or been dismissed for the want of it. It is true, in the case of *Clark v. Brockway*, 6 Ohio, 45, the bill does \*not appear, from the [419 report, to have distinctly set forth what has since been required; but that case seems to have rested upon its own peculiar circumstances. The judge who delivered the opinion remarks: "We should have been better satisfied if the complainant had proffered payment of the money due, and, if refused, had brought it into court; but the case, admitted by the demurrer, is so strongly marked, and the exactions, for the use of the money, so scandalous, that we are induced, without intending to establish a precedent, to overlook the omission."

There is also another objection to sustaining this bill, and equally fatal. The interest, excessive as it was, was paid; and, whether we place the case upon the ground of an executed contract—or, as

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Saterlee et al. v. Stevens.

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one which is against sound morals, or *malum prohibitum*, and the parties, therefore, in *pari delicto*—we know of no principle by which it can be recovered back. And, in analogous cases, it has been repeatedly so held on the circuit, and in this court.

As to the two and a half per centum, attorney's collection fees, which were included in the judgment, it is equally clear the place for its correction is not on the equity side of this court. That such agreements are against sound policy, and void, was decided in the case of the State of Ohio, for the use of the Fund Commissioners, *v. Taylor*, 10 Ohio, 378. The complainants, however, have adequate remedy at law. The warrant of attorney, in which this two and one-half per cent. is contracted for, forms a part of the record; and the error, if any exist, is apparent on the record, and may be corrected, on motion to set aside the judgment, or by a writ of error. *McKee v. Bank of Mount Pleasant*, 7 Ohio, 175, pt. 2.

The injunction is dissolved, and bill dismissed. Bill dismissed.

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#### 420] \*SATERLEE, MASTERS AND BEBEE v. HORACE STEVENS

A defective appeal bond, if it contain the substance of a bond, will sustain an appeal, so far as to justify an order to file a new bond.

THIS was a motion to quash an appeal, from the county of Trumbull.

Judgment had been rendered against the plaintiffs in the court of common pleas, and they gave notice of their intention to appeal to the Supreme Court. Within the thirty days, the following bond was filed in the clerk's office:

"Know all men by these presents, that I, Jacob H. Baldwin, as principal, am held and firmly bound unto Horace Stevens, in the penal sum of \$100. That the payment of which may be well and truly made, we jointly and severally bind ourselves. Signed and sealed May 2, A. D. 1842. The condition of the above obligation is such, that, whereas, Horace Stevens, at the April term, 1842, of the court of common pleas within and for the county of Trumbull,

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in the State of Ohio, recovered a judgment against ——— for the sum of ——— dollars, ——— cents, for his costs of suit in an action of assumpsit, from which said judgment ——— the said ——— has appealed to the next Supreme Court of the State of Ohio, to be held within and for the said county of Trumbull. Now, therefore, if the said ——— shall pay the full amount of the condemnation money, in the Supreme Court, and costs in case a judgment ——— shall be entered therein in favor of the appellee, then this obligation shall be null and void, otherwise to remain in full force and virtue in law.

“JACOB H. BALDWIN.” [L. s.]

The bond was indorsed by the clerk as follows:

“Saterlee, Masters and Bebee v. Horace Stevens.”

“Appeal Bond.”

“Filed, May 2, 1842.”

\*At the September term of the Supreme Court, a motion [421] was made by the defendant to quash the appeal. The plaintiffs at the same time moved for leave to perfect their appeal by filing a new bond.

CROWELL & ABELL, for plaintiffs.

TAYLOR & HARRIS, for defendant.

BIRCHARD, J. It was formerly held in this state that if a sufficient bond was not filed in due time, the appellate court had no jurisdiction of the case, and could neither permit a new bond to be filed nor make any other order in the case. Owing to carelessness of parties, and others in preparing and executing bonds, many appeals were consequently lost. To remedy the evil a statute was provided, Swan's Stat. 686, authorizing the appellate court to order a new bond to be given, if, on exception taken, the bond should be found defective either in form or in any other respect. This being a remedial statute, should be liberally construed. The condition of this bond is defective. It does not name the suit. From its face, independent of the indorsement, it could not be ascertained that it belonged to any particular suit in court; yet giving the law a liberal interpretation, it may with propriety be called a defective appeal bond, and justify an order to file a new one. Taking the face of the instrument in connection with the indorsement, there is something to amend by. It is under seal, and purports to bind J. H. Baldwin to Horace Stevens, in the sum of one hundred

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Job v. Collier.

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dollars. This makes it a bond. As the law now stands, any paper coming within the legal definition of a *bond*, employing the term in its largest sense, however defective in other respects, will, if filed in due time for that purpose, sustain an appeal. An instrument without obligor or obligee, or in blank, as to the sum, would be insufficient. The motion to quash overruled. Leave given to file a new bond.

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422]

\*GEORGE JOB v. JAMES COLLIER.

Money paid on a judgment can not be recovered back while the judgment remains in force.

A judgment entered without objection, in the name of the plaintiff, as commissioner of insolvents, is, between the parties, evidence that the plaintiff was such officer.

THIS was a writ of error to the Supreme Court of Greene county.

The original action was *assumpsit*. The declaration was on the common counts, the plea *non assumpsit*. At the May term of the Supreme Court, 1841, the cause came on for trial, and, by consent of parties, was submitted to the court without the intervention of a jury. The court found for defendant, and rendered judgment in his favor for costs. A bill of exceptions was taken, which showed the following facts:

In 1824, James Collier, the defendant in error, was appointed commissioner of insolvents, under the law then existing, and was not thereafter reappointed. He was at no time appointed under the act of 1831. In December, 1832, Collier, holding himself out as commissioner of insolvents for Greene county, one Robert C. Poland, believing him to be such commissioner, made application to him for the benefit of the act for the relief of insolvent debtors, gave in his schedule, made an assignment, took the oath, and gave the bond required, with George Job, the plaintiff in error, as one of the sureties. The proceedings were returned to the court of common pleas, there dismissed, and the bond forfeited.

The bond was put in suit by Collier as commissioner, judgment rendered in his favor against Job for the penalty, and \$800

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has been paid by the plaintiff in error in part satisfaction. To recover back the sum so paid to Collier, this suit was brought.

\*Wood, J. In rendering judgment for the defendant, [423 upon the above facts, did the Supreme Court err?

To determine this, it seems to us unnecessary to refer to the act of 1831, repealing that of 1824, and re-enacting, among others, the same provisions. Whether Collier was, or was not, the commissioner of insolvents, when the bond was executed, *de jure*, or even *de facto*, is now of no import. The judgment, in his favor, *quoad* this plaintiff, establishes that fact sufficiently. If he were not such commissioner, the plaintiff in error should have litigated that question in the suit on the bond. Instead of doing so, he suffered judgment to pass, and paid the money on the judgment. It went to pay the debts of his principal, and now he seeks to recover it again out of the pocket of the commissioner, who was, doubtless, innocently acting under the belief that he was, *de jure*, the commissioner, whether he was so, or not, in fact.

But that judgment on the bond still remains unreversed, and the payment of money on it, is a payment by him, and a receipt by the commissioner, of the money, under authority of that judgment. It is equivalent to the payment of money into court, and can not be recovered back.

WILLIAM ELLSBERY, for plaintiff.

A. HARLAN, for defendant.

Judgment affirmed.

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JAMES McCONNELL v. JAMES COLLIER.

THIS was also a writ of error from Greene county, and stood upon the same grounds as the preceding case, the plaintiff in error being one of the securities on the same bond, for Poland.

Judgment affirmed.

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Montgomery v. State of Ohio.

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## 424] ROBERT MONTGOMERY v. THE STATE OF OHIO.

It is error to admit evidence of dying declarations, without first finding that the deceased was conscious of his condition when making them.

It is not error to allow a witness to state the substance of competent dying declarations, although he may not be able to give the precise words.

An intent to kill may be an ingredient of the crime of manslaughter, but, under our statute, it is not a necessary ingredient.

The right of a jury to judge of the law in a criminal case is not absolute, but is to be exercised (agreeably to section 6, article 3, of the constitution), "under the direction of the court."

THIS is a writ of error to the court of common pleas of Ashtabula county.

The plaintiff in error was tried and found guilty of manslaughter. On the trial, a bill of exceptions was taken to the ruling of the court, on the admission of testimony, and to the instructions given to the jury. The bill shows that the court permitted the prosecutor to prove that Hackett, the deceased, just before his death, and while in *extremis*, said that, what he had sworn to a few days before, on the trial of a complaint against the plaintiff in error, for an assault and battery, growing out of the quarrel in which deceased received the mortal injury, and also what he had told the witness, the morning of his death, touching the injury of which he died, "was God's truth, and that the whole of those statements were true." Upon this, the court allowed the witness to prove the substance of both statements.

The assignment alleges that there was error in receiving this evidence without proof that Hackett was, at the time, conscious of immediate death; also, in receiving the substance only of the testimony of Hackett, given on the trial for assault and battery.

Other errors were assigned, which are noticed in the opinion of the court.

425] \*WADE & RANNEY, for the plaintiff in error, argued that dying declarations can not be received without preliminary proof that the person making them was conscious of approaching dissolution. 1 Stark. Ev. 23; 2 Ib. 261; 2 Russell on Crimes, 683; Greenl. Ev. 188; McNally's Ev. 174; Switt's Ev. 124; State v.



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Moody, 2 Hayw. 31; Rex v. Crockett, 4 Car. & P. 544; Rex v. Woodcock, Leach's C. L. 563.

That the dying declarations did not relate to any facts or circumstances competent to be given in evidence, but only referred to former statements made by him. That those statements, even if competent, must be proven as made; their substance is not sufficient. 2 Evans' Pothier, 293; Bliss v. Long, Wright, 351; Smith v. Smith, Wright, 648. They also insisted that the court erred in charging that the jury were not exclusive judges of the law and fact, and in charging that an intent to kill was not essential to constitute the crime of manslaughter.

The reporter was furnished with no argument on the part of the state.

BIRCHARD, J. We should not think that the court erred in permitting the substance of Hackett's statements to be given in evidence, although the witness was unable to give the precise words, and in leaving the credit of the narration and the weight of the evidence to the jury, were there no other objections. The deceased alluded to both statements at the time, and, by reaffirming them, he made them as much his dying declarations as if he had then repeated them at length. The substantial objection to the proof, is, that it was received without a preliminary inquiry by the court, establishing the fact that the deceased not only made the declarations just before death, and while in *extremis*, but also that he was conscious of his true condition. It is this consciousness, coupled with the condition of the party, which supplies the place of an oath, and peculiarly distinguishes dying declarations from hearsay. In omitting \*this inquiry, a majority of the [426 court believe there was error, and that, for that cause alone, new trial should be awarded.

In the charge to the jury the court said, "that intention to kill was not a necessary ingredient in manslaughter, arising from a sudden quarrel;" and this is assigned for error. We are all of opinion that in this there was no error. The point, however, is urged with much ability, and it is claimed to have been twice decided by this court upon the circuit, to wit, in the State v. Turner, Wright, 27; and State v. Town, Wright, 76. Those were cases of murder in which this question was not necessarily made. From the recollection of one member of this court, before whom the

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causes were tried, we are inclined to believe that they are so reported, as, on this point, to give an erroneous impression of the actual opinion of the court. That the crime of manslaughter may be committed by an intentional killing, upon a sudden quarrel, is not doubted; but that in all cases this precise intent must exist is what we are unprepared to admit. The statute provides for the punishment of one "who shall unlawfully kill another, without malice, upon a sudden quarrel," and declares he shall be deemed guilty of manslaughter. Swan's Stat. 228. Is it not clear if one strike another with a dangerous and unlawful weapon, upon a sudden quarrel, or beat him in a cruel and vindictive manner, so that death ensues, although there was no specific intent to produce death, that the crime would be manslaughter? If so, an intent to kill is not a necessary ingredient of manslaughter under this clause of the statute. Again, the court were asked to charge that the jury were judges of the law and facts. The court refused to instruct in this form; but said the jury had the power, and, if they chose to exert it, the right to determine all questions of law and fact, so far as to acquit, and, if they did so, there was no power to correct any error committed by them in such acquittal, and that they were not exclusive judges of both law and fact, as a general rule, in criminal prosecutions; for, if they found the accused guilty, and it turned out that their finding was illegal, they had no power, but the court had, to set aside their verdict and 427] grant a new \*trial. In this refusal to instruct, as requested, and in the instruction given, it is alleged there was error. It does not, however, appear to us that there was anything erroneous which could prejudice the rights of the plaintiff. We are aware that in some parts of the state, an opinion prevails that in all criminal trials the jury have a right, independent of the directions of court, to determine as well the law of a case as the facts.

By the last clause of section 6 of article 8 of the constitution of this state, it is declared that "in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases." It would seem, from this, that the framers of our bill of rights did not imagine that juries were rightfully judges of law and fact in criminal cases, independently of the directions of courts. Their right to judge of the law, is a right to be exercised only under the direction of the court; and, if they go aside from that direction, and deter-

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mine the law incorrectly, they depart from their duty, and commit a public wrong; and this in criminal, as well as in civil cases.†

As the court erred in admitting the declarations of Hackett, without the necessary preliminary proof, a new trial must be awarded. Remanded for new trial.

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**\*THE TREASURER OF PERRY COUNTY V. WILLIAM F. MOEL- [428  
LEE AND THOMAS HOOD.**

Under section 5 of the act pointing out the mode of levying taxes, a merchant, commencing business after the 1st day of March, is bound to report the whole amount of capital employed or invested by him in trade at the time of making report.

A report of the average value of merchandise, or stock, on hand during the year, is not a compliance with the statute.

THIS is an action of debt, from Perry county, upon the following agreed case :

"The defendants commenced the business of merchandising at Somerset, in Perry county, as partners, after March 1, 1841. Sixteen days after they so commenced, the defendant, Hood, went to the auditor of the county, to make report of their capital, and was sworn by the auditor, to make true answers or statements, touching the capital employed by the defendants in merchandising; thereupon, the said Hood stated that he supposed the actual value of the stock of goods of the firm, then on hand, to be about \$5,000, but that the average value of the goods they would have on hand, throughout the year, would be about \$2,500, and insisted that the average value was the true standard for taxation, and that it should be taken by the auditor as the report, and refused to give in the \$5,000 value as the report, or to allow the auditor to cer-

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†The jury are the judges of the facts, both in civil and criminal cases, but they are not, in either, the judges of the law. They are bound to find the law as it is propounded to them by the court. They may, indeed, find a general verdict, including both the law and the facts, but if, in such verdict, they find the law contrary to the instructions of the court, they thereby violate their oath. *Townsend v. The State*, 2 Blackf. 151.

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tify that value to the treasurer. The auditor treated this as no report, refusing to take the \$2,500 value, and made no entry, nor gave to Hood any certificate to take to the treasurer. Hood, however, then went to the treasurer, and tendered thirty dollars, as the amount of tax, which was refused by the treasurer."

H. H. HUNTER, for plaintiff.

STANBERRY and VAN TRUMP, for defendants.

429] \*BIRCHARD, J. In this case the question is, did defendants report the capital employed by them, as required by law? The agreed statement shows that they did not, unless their capital, within the meaning of the act, was \$2,500, instead of \$5,000, for the agreed case shows that they refused to allow the auditor to certify the latter sum to the treasurer. It follows that if \$2,500 was not the capital employed, there has been no such report as the law requires. This brings us to a consideration of what is meant by the words, "capital by him employed," as used in section 5. Swan's Stat. 908. The plaintiff claims they mean the amount of goods with which the trade has been commenced. The defendants claim that the average value of stock on hand during the year was the sum to be entered for taxation. Whatever may be the rule of estimating merchants' capital, under other sections of the statute, it appears to us that, under section 5, there can be little doubt but the legislature intended the merchant should report the actual value of the goods with which he commenced trade. Whether obtained on a credit or for cash, it is his capital; he employs it in trade.

No matter into what form he may change it, whether into money, book accounts against customers, or the produce of the country, or if he retain it upon the shelves of his store, it still, in all its varied forms, is capital employed by him, and within the year of his commencement. Had the legislature designed to require only the sum that might be continued, at all times, on hand during the year, or only the average amount of the capital employed, the reasonable presumption is, that words more appropriate to convey that meaning would have been used. Such as "the average of capital intended to be employed until the next annual assessment." But they say "the amount by him employed." When? The natural reply would be, at the time when required to report. Not the sum he intends to use in future, or may prob-

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ably employ prior to the next assessment, but what he begins with, or may have at the end of the month when required to make his report. It is \*not contemplated that this report should [430 be a matter of conjecture on the part of the merchant, but one of facts as they then existed. Judgment for plaintiff.

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THE STATE OF OHIO, ON RELATION OF NAPOLEON A. GUILLE, PROSECUTING ATTORNEY, v. SAMUEL CHAPMAN, JR.

The court of common pleas and Supreme Court have power to suspend an attorney from practicing in their respective courts, for official delinquency or base immorality.

Conviction for crime would be good cause for such suspension.

A record in an action of slander, where an attorney at law was plaintiff, showing that a plea charging him with the commission of crime, was found to be true, is not equivalent to a conviction for that offense.

Evidence in cases of this kind must be confined to and establish the specification.

THIS is a rule from the Supreme Court of Muskingum county, upon the defendant, to show cause why he should not be suspended from practicing as an attorney and counselor at law.

The material facts are stated in the opinion of the court.

Wood, J. This case was reserved in the county of Muskingum, at the November term, 1841. The Supreme Court for that county directed an entry to be made on the journal in these words:

"Ordered, that the prosecuting attorney file an information in this court, preferring charges for *malpractice* against Samuel Chapman, Jr., one of the attorneys of this court; that notice, pursuant to the statute, be forthwith issued and returned, and leave is given until the 25th of November inst. to take depositions, and this matter is adjourned to the next session of the court in bank for further order."

\*By virtue of this entry, the prosecuting attorney filed, in [431 substance, the following specifications:

1. That on November 4, 1840, a certain suit was pending in the

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Supreme Court of Muskingum county, in which said Chapman was plaintiff, and Charles C. Converse defendant, and in which Chapman filed his declaration, and therein charged the said Converse with speaking and publishing of him, said Chapman, that he had stolen from the files of the court of common pleas of Muskingum county a certain indictment of the State of Ohio, against James Alexander and others, for the crime of robbery, and that the said Converse, by way of defense and justification, set forth and charged in his second plea, that the said Chapman, on November 20, 1839, did take, steal, and carry away a certain indictment of the State of Ohio *v.* James Alexander and others, for the crime of robbery, etc.

That the said Converse, in his fourth plea to said action, charged and set forth, that the said Chapman, being retained as such attorney, etc., to defend the said Alexander and others on said indictment, on November 26, 1839, etc., improperly, dishonestly, furtively, wickedly, and contrary to his professional duty, did take away, secrete, and withhold from the custody of E. T. Cox, clerk of the court of common pleas, the said indictment, for the purpose of procuring the discharge of the said Alexander and others therefrom; that, at the November term, 1841, at the Supreme Court, etc., the aforesaid issues came on to be tried by a jury, and the jury, on their oaths, etc., did find and declare the matters and things in the said plea to be true, and, on which finding of the jury, the Supreme Court rendered judgment, etc.

2. Said Chapman, so being such attorney, etc., at, etc., did improperly, dishonestly, unlawfully, and wickedly take, carry away, and secrete and withhold from said Cox, clerk as aforesaid, the said indictment, etc., contrary to his duty as such attorney, etc.

3. That said Chapman did steal said indictment, etc.

432] \*4. That said Chapman took and secreted said indictment, and withheld it from said Cox, to hinder and obstruct public justice, etc. These are, substantially, the specifications, of which Chapman insists he is not guilty.

The statute which is supposed to authorize this inquiry, is section 4 of the act entitled "an act to regulate the admission and practice of attorneys and counselors at law," Swan's Stat. 96, in these words: "The supreme court, or court of common pleas, shall have power to suspend any attorney or counselor at law, from

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practicing in their respective courts, for misconduct in office, or for good cause shown."

The statute, it will be observed, is broad in its terms, and casts upon us the protection of the moral and official integrity of the profession. This court should not hesitate for a moment to exercise the discretion with which it is clothed by the law, to purify the bar of official delinquency and *base* immorality.

This is due to its own dignity, and to preserve the character and integrity of the whole profession from scandal and reproach. The discretion, however, with which we are invested, is by no means arbitrary, but to be applied according to legal rules. The allegations and the proofs are to be considered in the usual way, and they must correspond, substantially at least, or the accused must go acquitted.

The first specification in this case must have been framed upon the belief, that the pleas of justification, in the action of slander, being found to be true, was tantamount to a conviction for a felony. If so, the rule is clear, as stated by the courts, that such a conviction is, *per se*, a forfeiture of the office of an attorney. In such a case, Lord Mansfield says, "we have consulted all the judges, and, on application, struck the name of an attorney from the roll." *Rex v. Brownsell*, Cowp. 830. We are of the same opinion, that one, convicted of a felony, is an unfit person to continue in the profession; and whether committed in his private or official character, it would be good cause for his suspension. *The Bank of New York v. James Stryker*, 1 *Wheeler's Cr. Cas.* 330. Chapman, \*however, does not occupy this position. He has never been [433 prosecuted for larceny; but, if he has committed a larceny, though not convicted, or if he have committed any offense of a base nature, or any act as an attorney, which his oath of office and his fidelity in the profession are not to be confided in, it is good cause of suspension within the provisions of the statute. 1 *Wheeler's Cr. Cas.* 322; 1 *Bac. Abr.* 306; 1 *Hawk. P. C.* 277, 279.

The record in the slander suit, however, finding the pleas of justification true, is, in this case, by no means conclusive evidence of the facts set up in those pleas. The record is not between the same parties, and if admitted at all, any presumption arising from it may be rebutted by other proof. The parties were aware of this, and a great number of depositions have been taken, both by those who prosecuted and by the accused. In the opinion of a majority

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of the court, the proof establishes the fact, that Chapman had the indictment in his possession; that he kept it a long time; that he was inquired of and denied all knowledge of it, and that he was, at the same time, the attorney for Alexander and others; that he afterward returned the indictment to the clerk's office, *secretly*, and placed it in the proper files. If the evidence were to close here, there would be but one opinion—that of guilt; that the charge of larceny, of secreting the indictment, withholding it from the clerk, and attempting to obstruct and hinder public justice, were sustained. It, however, appears from the evidence, equally clear, to a majority of the court, that Chapman neither stole the indictment nor knew that he had it, when inquiry was made; that it was probably mislaid; but, as soon as discovered, he replaced it *secretly*, upon the files. This return of the indictment, *secretly*, can not be commended. It deserves severe rebuke; but still, I can hardly think it evinces, under the circumstances, any criminal design. Had his intent been criminal, Chapman would doubtless have destroyed the indictment, and not hazarded exposure by its return. He ought, truly and frankly, to have admitted his error, and delivered the indictment to the clerk. There had, however, been 434] *\*crimination and recrimination*; the whole elements of society seem to have been agitated and disturbed, and it is, after all, not very remarkable that Chapman had not sufficient moral courage to admit he had the indictment, and to openly return it.

Let us then, briefly, see how this case stands. Chapman is charged with being *convicted* of stealing the indictment. He is charged with secretly taking it, with holding and secreting it from the clerk, and with intention to obstruct and hinder public justice.

The truth is, he had it innocently, he knew not it was in his possession, and denied having it; and when found, he returned it *secretly*, and, with this *secret return*, if criminal, immoral, or fraudulent, he is not accused. It is, therefore, the opinion of a majority of the court, that the charges are not sustained by the proof, and that they should be dismissed. Rule discharged.

LANE, C. J., dissenting. I can not agree with my brethren in their conclusion. When two verdicts have found, in terms, that an individual has stolen the records of a court, which verdicts



## Hamilton v. State of Ohio.

have been approved by the tribunals where they were rendered, and which seem to be sustained by the testimony before us, I regard him as an unfit person to continue any longer a member of the Ohio bar.†

## \*WILLIAM S. HAMILTON v. THE STATE OF OHIO. [435]

A person having possession, in this state, of property which he had stolen in another, may be convicted here of larceny.

THIS is a writ of error, to the court of common pleas of Lawrence county.

The plaintiff in error was indicted for horse stealing. The court charged the jury that if the horse was stolen by the accused in the State of Illinois, and brought by him into the State of Ohio, he might be convicted of the crime of horse stealing in this state. This charge is claimed to be erroneous.

LEGRAND BYINGTON, for the plaintiff in error:

The doctrine of a new larceny for every fresh *asportation*, as known to the common law, is confined to the limits of the sovereignty, and can not be extended beyond it. This is supported by the following considerations:

1. The grade of the offense, the mode of trial, the quantum of punishment, and the process of expiation, would all be liable to be varied by the offender crossing a state line.

2. It would subject the offender to trial in a tribunal powerless to compel the attendance of witnesses necessary to establish the time, manner, and place of the original taking, and to explain the possession.

3. It would render nugatory, as to this offense, the act of Congress providing for the surrender and delivery of fugitives from justice.

4. It would abrogate the provision of the constitution that no one "shall be twice put in jeopardy for the same offense," for the

†Browne's case, 1 How. 303; Holding's case, 1 McCord, 379; 3 Paige, 510; Brownell's case, Cowp. 829; Southerly's case, 6 East, 143; Smith's case, 5 Eng. Com. Law, 172; Kempton's case, 2 Ves. & Beame, 352.

record of conviction or acquittal would not be binding in another state.

**436]** 5. \*It subjects a person to penalties for an act not denounced by the laws of this state.

All crimes punishable by the laws of this state are statutory. They can not exist independent of statute. The penalties are prescribed by statute; but in this state there is no statute making it an offense to possess property stolen in another or prescribing any punishment for such offense. Nor can it be necessarily presumed that stealing a horse in Illinois constitutes there an offense of the same grade and subject to the same penalties as in this state. Necessity furnishes no ground for our courts to assume jurisdiction in such case. For the act of Congress has provided ample means whereby an offender against the laws of one state found within the limits of another can be reclaimed and brought to justice.

It is not sanctioned by the common law; for a larceny committed in Scotland or Ireland could not be tried or punished in the English courts until acts of parliament, 13 Geo. III, ch. 31, 54, and 44 Geo. III, ch. 92, 57, were passed. 4 Chitty's Blackstone, 25, note 12.

It has also been held, in various states in this Union, that a person can not be convicted of larceny upon bringing into one state property stolen in another, as in the cases of the *People v. Gardner*, 2 Johns. 477; *People v. Schenck*, 2 Johns. 494; *The State v. Brown*, 1 Hayward, 100. These cases are cited and referred to in 1 New York Digest, 102; 2 Russell on Crimes, 176, note 1.

The charge of the court, therefore, is not sustained by the statute, the only foundation for criminal jurisdiction; and it is opposed to the common law and the practice in other states.

S. M. TRACEY, for the state:

The cases in 1 Mass. 116; 2 Mass. 14; 5 Binn. 617; 3 Conn. 185, and 1 Root, 69, sustain the charge of the court.

Of the cases cited on the other side, that of *Gardner*, 2 Johns. **437]** 477, is the leading case in this country. It is of \*no authority, *per se*, because the court assign no reasons, but merely refer to 2 East's Pleas of the Crown, 774, tit. Larceny and Robbery, sec. 157. East here states the common-law doctrine, "that possession of goods stolen by the thief is a larceny in every county into which he carries the goods; because the legal possession still remaining in the true owner, every moment's continuance

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of the trespass and felony amounts to a new caption and asportation. To this, however, there are some exceptions; as where the original taking is such whereof the common law can not take cognizance. And the same exception prevailed till lately in cases where the original taking was in Scotland," citing *Rex v. Anderson et al.*, MS. case. "But that by the statute (13 Geo. III), the exception had ceased to prevail. This statute of 13 Geo. III is declaratory of the common law doctrine."

Gardner's case is not sustained by the authority to which it refers, and consequently imposes upon New York, also, the necessity of enacting a statute declaratory of the common law. 11 Wend. 129.

LANE, C. J. The question on the record is not new, but has often arisen here and elsewhere. In Tennessee, Kentucky, and Pennsylvania, possession, by the thief, of property in one state which has been stolen in another, is not held sufficient for conviction. Such has been the doctrine in New York, although against the opinion of a late chief justice; but the power to convict, in such cases, has now been given by statute. In Massachusetts and Connecticut, such convictions have always been sustained. In England, the original taking must be within the kingdom.

A majority of the court entertain the opinion that a long-sustained practice in the criminal courts of this state has settled the construction on this point and established the right to convict in such cases. But, if not settled by usage, we feel free to choose, between these conflicting practices, a course best sustained by analogy and best calculated to promote justice.

\*It would afford a large immunity for crime if thieves [438 from other states were exempted from any other penalty than the remote risk of being returned to the place where the crime was first committed. We feel no scruples in inflicting his punishment here, and are justified, as well by the cases cited as by holding each continued possession, in our jurisdiction, of property stolen within another, as a crime well deserving the penalty of the law.

Judgment affirmed.

READ, J., dissenting. In this case I am unable to concur with my brethren in the legal proposition, that a person stealing property in a sister state or a foreign jurisdiction, and bringing it

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within the State of Ohio, may be here indicted and punished for the larceny. It is from no over-sympathy with the criminal, but a belief that the law will not authorize this conviction. He may be sent back to the state where the offense was committed and there punished, but not here.

This question is not new. It has been held that larceny committed in one of the United States is not punishable in another, although the thing stolen be brought into the latter state. Such are the decisions in Pennsylvania, New York, Tennessee, and North Carolina. *State v. Brown*, 1 Hayw. 100; *People v. Gardner*, 2 Johns. 477; *People v. Schenck*, Id. 479; *Commonwealth v. Simmons*, 5 Binn. 617; *McCullough's case*, Rogers, 45. To the contrary, the *Commonwealth v. Collins*, 1 Mass. 115; *Commonwealth v. Andrew*, 2 Mass. 14; *State v. Ellis*, 2 Conn.

The State of New York has since provided, by statute, for punishing such possession within her limits, upon which the decision in 11 Wend. 129, was made. True, Judge Savage remarks that it was his opinion such case might be punished prior to the statute. But it must be recollected that he speaks in reference to himself as prosecutor, as he prosecuted the case of the *People v. Gardner*, when the court refused to sustain him.

439] \*Upon what principle can such conviction be sustained? Is it upon a constructive new taking in every state where the thief may be found in the possession of the thing stolen? This principle was applied to the possession of the thing stolen, at common law, in every county where the thief might be found in such possession, to authorize conviction for the original theft, but never as between independent jurisdictions or states. At common law, if a person stole goods in a foreign state, or even in Scotland, Ireland, or the Isle of Jersey, or at sea, and brought them into England, he could not, upon a constructive taking, be punished for theft in England. To meet cases within the united kingdom the statute of 7 and 8 Geo. IV, ch. 29, sec. 76, was passed. Even now, persons stealing within foreign jurisdictions or states, and found in possession of the thing stolen, are not punishable in England. *Roscoe's Crim. Ev.* 589; 2 Eng. Crown Cas. 329.

Upon what principle can it be held, in Ohio, that a person found in the possession of a thing stolen in a sister state should be construed to have stolen the thing in Ohio? Not upon the common-law principle, for the common law expressly forbids it.

Not upon a statute of this state, for there is none. Shall it be upon usage? This would be a novelty in a state where no man can be punished for a crime unless the offense be specifically defined by a statute of the state prescribing the exact punishment. Shall it be from the necessity of the case lest a rogue escape? Necessity confers no criminal jurisdiction, and is the well-known plea of tyrants.

If the conviction can only be sustained upon the ground that the prisoner actually stole the horse in Ohio, the reply is, he actually stole the horse in the State of Illinois. There must be an actual theft in Ohio, to violate our statute and to constitute theft—a taking and carrying away are both necessary. But there is no taking in Ohio. Without a taking from the owner, there could be no larceny. To supply the want of an actual taking, it is contended that a mere taking is to be construed, from the wrongful possession, into a larceny, in every new jurisdiction where the property may be carried. Upon \*which, then, [440 is this prisoner convicted, the construction or the statute? To contend that every moment's possession and wrongful detention of the stolen property from the rightful owner is, by the law, construed into a new and distinct taking or theft, might authorize the conviction of a man a hundred times for the same theft; for, if they are distinct thefts, conviction in one will be no bar to a conviction for the others. Now, at common law, whence this constructive doctrine is derived, it is only so held to give the county where the thief is taken with the goods, jurisdiction to try and convict him of the one original theft, and this is a bar to any other conviction. The law does not make distinct larcenies by construction, but it is a mere fiction to give jurisdiction to the county. This construction is merely to give jurisdiction, and not to divide it and make one larceny into many; and this, too, merely to try and punish him under the same law which he violated in committing the theft. Apply this to different states, with laws prescribing different punishments for larcenies, and having the right to punish all offenses committed within their limits, and what follows? You do not, by this construction, give jurisdiction to try the thief under the laws where the theft was committed, but by construction draw the offense to a new jurisdiction, and under a different law prescribing a different punishment.

The construction, then, creates the offense, when the statute only

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can do it, and creates a crime under a new law, instead of conferring jurisdiction to try the accused under the law which he has violated. It amounts to this: that there is a new larceny in each state where the thief may go with the property, and that he may be punished for the same larceny as many times as he may have been in different states with the thing stolen; for prosecution and conviction in one state is no bar to a prosecution and conviction in another. And, hence, a sort of custom, usage, or legal inference overturns, not only the principles of common justice, but the fundamental principle that a man shall be punished but once for the same offense. But will it be said, there is a great evil in 441] permitting thieves to \*live within our borders in the guilty possession of property which they have stolen in another state? True, but they must be delivered up if demanded; and it would be very easy for the legislature to pass a law to punish a thief for having in his possession, within this state, goods which he has stolen in another. This the State of New York has done, and so may every other state; and I trust that our legislature may pass such a law. The question is not whether there should be some law upon the subject, but whether there is any? And, feeling clear that there is none, I hold the prisoner to be confined without legal authority; and, moreover, that this court can not confer such authority. Even if it be doubtful, upon all principles of jurisprudence, that doubt should be resolved in favor of the prisoner. If the state may rely, for conviction, upon the usages of some states in which such convictions have been held to be right, why may not the prisoner rely upon the authorities in other states where such convictions have been held to be wrong?

No principle of the common law warrants this conviction; no statute authorizes it; and, clearly, no usage or custom can confer such authority, especially when it violates the soundest principles upon which criminal justice is known to be administered, and authorizes a man to be convicted more than once for the same offense.

My confidence in my brethren would have induced me, if my convictions as to the law on this subject had not, in my own mind, been perfectly clear, at least to have acquiesced, deferring my doubts, if I entertained any, to their opinion.

**\*THE LESSEE OF MARY S. PERRY v. DANIEL BRAINARD. [442**

In this state the guardianship of a minor female expires, by operation of law, when the ward arrives at the age of twelve years.

A guardian, appointed for such ward, when under the age of twelve years, can not, as such guardian, by petition filed after the ward arrives at the age of twelve years, sell the ward's land.

A sale, under an order of court upon such petition, is void.

THIS case was reserved on the last circuit, from Sandusky county.

It is an action of ejectment, to recover the possession of lot No. 144, in the town of Sandusky. The principal facts are agreed.

At the May term, 1828, of the court of common pleas of Sandusky county, Jaques Hulburt was appointed guardian for Mary S. Perry, a minor, who was then nine years and eight months old, and was seized in fee of the lot in question. At the May term, 1831, of said court, Hulburt, as guardian for Mary S. Perry, who was then twelve years and eight months old, filed his petition for the sale of said lot, setting forth that she was twelve years of age, that said lot was situated in Lower Sandusky, and was subject to taxation, and that the investment of the funds in wild land would be of greater advantage to the minor heir, etc., and praying a sale. At the October term, 1831, the court ordered a sale of the lot, and, at the March term, 1832, the guardian reported a sale of said lot to the defendant, Brainard. The report was approved, the sale confirmed, and the guardian ordered to make a deed to the purchaser. On August 25, 1835, the guardian executed a deed of the premises to the defendant, Brainard. The record of Hulburt's appointment recites that Mary S. Perry was, at that time, nine years old.

The reporter was furnished with no arguments.

**\*WOOD, J.** From the admissions and proofs in this case, [443 the question first arises whether Hulburt was the guardian of this minor heir, the plaintiff's lessor, when the petition for the sale of her land was filed. If not, there was a defect of power, and the subsequent proceedings conveyed no title to the defendant, but it

still remains in *Mary S. Perry*. This question must be determined principally by the construction of our own statute, and we have not been able to find any case strictly analogous in the reports of other states.

If this question be decided in the negative, there is clearly an end of the affair; it then becomes unnecessary to touch any other question raised, but judgment must be given for the plaintiff.

The statute provides that the court of common pleas shall have power, when they think it necessary, to appoint guardians for minors, and, on good cause shown, to authorize such guardians to sell such minor's land. *Swan's Stat.* 430. Section 6 enacts, "that when these minors aforesaid, males above fourteen, and females above twelve years of age, or when any minors for whom the court have appointed a guardian or guardians, shall arrive at the respective ages aforesaid, such minors may severally choose a guardian or guardians, such as the court shall approve, and if such minors do not come before the court and choose a guardian or guardians after being notified by the court so to do, the court shall appoint a guardian or guardians for them as aforesaid."

It seems to us the obvious construction of this section is, that the appointment of a guardian to a female under twelve years, though unlimited on the face of the appointment, ceases by its legal expiration when the ward arrives at the age of twelve years. At that age the law deems her of sufficient discretion and capacity to have a choice of the person who is to control not only her property but herself, subject, nevertheless, to the approval of the court; and it is then, only, after being notified to appear and make such choice, and refusal on her part, that the court are authorized and required to appoint a guardian if she is over twelve years of age.

444] \*That the appointment expires by its own limitation when the ward arrives at the age of twelve years, was decided in the case of *Campbell v. English and wife*, *Wright*, 119. The court then held this language: "A guardian for a female under twelve years of age continues only until the ward attains to that age. A guardian, or a man that has been guardian, after his guardianship has expired, has no more power than if he had never been appointed." We see no reason to question the soundness of this principle. It accords with our own views.

How, then, stands the case at bar? It is admitted the guardian



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filed his petition for the sale of the land after the ward had arrived at the age of twelve years, and at a time when the law had determined his guardianship. All the proceedings subsequent to, and including the petition for the sale of the lot, are therefore void, and convey no title to the defendant. Judgment for plaintiff.

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**THE COMMERCIAL BANK OF LAKE ERIE v. THE WESTERN RESERVE BANK ET AL.****THE WESTERN RESERVE BANK v. THE COMMERCIAL BANK OF LAKE ERIE ET AL.**

A judgment creditor may not, unnecessarily and without cause, relinquish a levy to the prejudice of purchasers, but embarrassments upon the title, difficulties in making a fair sale, or the probability of not making the money from it in consequence of earlier incumbrances, are sufficient causes.

The relation of principal and surety continues after judgment.

Lands lying under a judgment lien, which have been sold to purchasers, must be sold to satisfy the judgment, in the inverse order of the dates of the purchase.

THESE suits are a bill and cross-bill in chancery from Cuyahoga county, to settle liens and priorities between creditors, by judgment and otherwise, of Clarke and Willey.

\*The Western Reserve Bank recovered judgment, by [445 cognovit, against James Clarke, Willey, and Edmund Clarke, on May 12, 1837. Edmund Clarke is really a surety, but the judgment is entered against the defendants generally, without any certificate of the fact. On June 19, 1837, a writ of error was prosecuted, by which proceedings were stayed until affirmance of the judgment, in August, 1838. In November, 1838, execution was issued on this judgment, and levied on lot No. 51, in Ohio City, and on lot No. 95, in Cleveland. In April, 1839, the levy, under this execution, was set aside at their instance. A partial satisfaction of the judgment was then obtained by the sale of other property, in proceedings not necessary to be further noticed.

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Another execution, on August 26, 1839, was levied upon seventeen lots of land, of which six belong, jointly, to Clarke and Willey, two to Willey, three to J. Clarke, and six to E. Clarke. After the judgment was obtained by the Western Reserve Bank, before execution, and while proceedings were suspended by the writ of error, those lots, of the seventeen, which belonged to Clarke and Willey, or to either of them, were mortgaged or sold to other defendants.

Oct. 9, 1837. Three of them were mortgaged to the Commercial Bank.

Oct. 17, 1837. One was mortgaged to L. Kendall.

Oct. 18, 1837. Three to the Bank of Cleveland.

April 2, 1838. Two to Fanny Willis.

April 3, 1838. One to Williams & Fitch.

April 10, 1838. One to P. M. Weddell.

June 9, 1838. One to Clarke, Raymond & Clarke.

Upon this state of facts, the claims of the parties may be classified as follows :

The Western Reserve Bank insist on the right to have satisfaction of their execution, from any of the seventeen lots, whether in the hands of purchasers from Clarke and Willey, or belonging to Edmund Clarke.

The surety, Edmund Clarke, and the purchasers from Clarke and Willey, unite in declaring that the lots they own shall be 446] \*discharged from the lien, because the plaintiff set aside its first levy on lots 51 and 95.

Edmund Clarke relies on his right, as surety, to have the lands of Clarke and Willey, although in the hands of purchasers, first subjected to the judgment.

The purchasers deny to Edmund Clarke the privileges of a surety, and require that satisfaction of the judgment be first sought from his land before theirs.

If the Western Reserve Bank has lost no lien, and if Edmund Clarke is permitted to avail himself of his privileges as surety, then questions arise between the purchasers as to the order in which the lands shall be sold.

The questions were elaborately discussed by counsel for the respective parties. There is room only to insert the authorities adduced.

H. Foote, for the Bank of Lake Erie, cited :

Douglas v. Houston et al., 6 Ohio, 156 ; Miami Exporting Co.

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v. Turnpin, 3 Ohio, 514; McCormick v. Alexander, 2 Ohio, 65; Reynolds et al. v. Rogers' Ex'rs, 5 Ohio, 169; Piatt v. St. Clair's Heirs, 6 Ohio, 227; The Bank of Muskingum v. Carpenter's Adm'rs, 7 Ohio, 21; 1 Hopkins' Ch. 460; 4 Johns. Ch. 123; 19 Johns. 486; Arnold v. Fuller's Heirs, 1 Ohio, 458; Jackson v. Loomis, 18 Johns. 81; Ford v. Commissioners of Geauga County, 7 Ohio, 148; Neimawitz v. Gahn, 3 Paige's Ch. 614; Ib., 11 Wend. 123; 2 Chit. 125; 18 Eng. C. L. 273; Bay v. Tallmadge, 5 Johns. Ch. 305; Lenox v. Prout, 3 Wheat. 520; Sir William Herbert's Case, 3 Co.; Harvey v. Woodhouse, Sel. Cas. in Chan. 3, 4; Fleetwood's Case, Hob. 45; Gill v. Lyon, 1 Johns. Ch. 447; Clowes v. Dickinson, 5 Johns. Ch. 235; Ib., 9 Cow. 403; Goverman v. Lynch, 2 Paige's Ch. 300; Guion et al. v. Knapp, 6 Paige's Ch. 35; Skeel v. Spraker et al., 8 Paige's Ch. 182; Coddingtton v. Bay, 20 Johns. 637; Waddell v. Howell, 9 Wend. 170; \*Rosa v. Brotherson, 10 Wend. 85; Ontario Bank v. Worth- [447 ington, 12 Wend. 600; Riley et al. v. Johnson et al., 8 Ohio, 526; Dickinson v. Tillinghast, 4 Paige's Ch. 215; 4 Kent's Com. 168; 22 Pick. 231; Sugden on Vend. 302; 1 Story's Eq. 595; Dorr v Shaw, 4 Johns. Ch. 17; Ex parte Kendall, 17 Ves. 520.

BISHOP & BACKUS, for the Western Reserve Bank, cited 10 Ohio, 508; 12 Johns. 252; 19 Johns. 492; 1 Madd. Ch. 251; 6 Ves. Ch. 714; 4 Johns. Ch. 20; 19 Ves. Ch. 527; 5 Ohio, 173; 4 Mass. 402; Norton v. Beaver et al., 5 Ohio, 178; 1 Ohio Cond. 256, 655; 6 Ohio, 162; 3 Ohio, 62; Patton v. Sheriff, etc., 1 Ohio Cond. 417; Brinkerhoff v. Marven, 5 Johns. Ch. 320; 4 Johns. Ch. 17; 17 Ves. 520; Lennox v. Prout, 3 Wheat. 520; Bay v. Tallmadge, 5 Johns. Ch. 305.

PETER HITCHCOCK, for Williams & Fitch, and for Clarke, Raymond & Clarke, cited Hubble v. Perrin & Hinkle, 3 Ohio, 287; Grosvenor v. Austin's Adm'rs, 6 Ohio, 113; Lennox v. Prout, 3 Wheat. 520; 3 Johns. Ch. 305; Swan's Stat. 481.

BOLTON & KELLY, for George Williams and Raymond & Clarke, cited 5 Johns. Ch. 403; 9 Cow. 403; 19 Johns. 486; 1 Hopk. Ch. 460; 6 Ohio, 242; Hays v. Ward, 4 Johns. Ch. 123; 1 Paige's Ch. 228; 5 Johns. Ch. 235; Coop. Eq. Pl. 5; Ib. 7; 7 Wheat. 522; 11 Pet. 229; 6 Johns. Ch. 564; 1 Story's Eq. 626; 3 Ohio, 288.

WADE & HURLBURT, for the Western Reserve Bank, cited Patton v. Sheriff of Pickaway County, 2 Ohio, 395; Norton v. Beaver, 5 Ohio, 178; Vincent v. Goddard, 7 \*Ohio, 188; 1 Johns. [448

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Ch. 409; Sug. on Vend. 322; 2 Vern. 286; Warnock v. Warnock, 3 Atk. 291; Warloy v. Scarborough, 3 Atk. 392; Mountford v. Sivet, 3 Madd. Ch. 34; Cheeseborough v. Willard, 1 Johns. Ch. 409; Connecticut v. Braddish, 14 Mass. 296; 2 Sug. on Vend. 257, n.; The United States v. Shultz, 3 Ohio, 61; Ib., 2 Ohio, 471.

PAYNE & WILLSON, for E. Clarke, cited Story's Eq. 595; Ex parte Kendall, 17 Ves. 520; Dorr v. Shaw, 4 Johns. Ch. 17, 20; Story's Eq. 598; Ib. 321, 322; Ib. 477; Ib. 480; Ib. 592; Aldrich v. Cooper, 8 Ves. 388; Goverman v. Stone, 1 Ves. 329; Cheeseborough v. Willard, 1 Johns. Ch. 413; Hayes v. Ward, 4 Johns. Ch. 130; 10 Johns. 524; Ib. 529; Stevens v. Cooper, 1 Johns. Ch. 430; Robinson v. Wilson, 2 Madd. Ch. 569; Ex parte Rushforth, 10 Ves. 410; Wright v. Mosely, 11 Ves. 22; Parsons v. Ruddock, 2 Vern. 608; Wright v. Simpson, 6 Ves. 734; 2 Fond. Eq., B. 3, ch. 2, p. 56, n. i; Sterling v. Forester, 3 Bligh, 590; Story's Eq. 82; Ib. 475, 480; 5 Ves. 92; 14 Ves. 159; 2 Bos. & Pul. 268; Dixon v. Ewing's Adm'rs, 3 Ohio, 280; 3 Ohio, 533; Ford v. Commissioners of Geauga county, 7 Ohio, 148; 2 Madd. Ch. 437; Miller v. Ord, 2 Binn. 382; Mahen v. Crickett, 2 Swanst. 185, 191; 4 Ves. 833; Capel v. Butler, 2 Sim. & Stu. 457.

LANE, C. J. It is first necessary to determine the character of Edmund Clarke. He came into the debt as surety, has signed the *cognovit* without designating his position, and suffered judgment to be taken without any certificate of the fact. Whether a surety can claim his privileges after judgment is a point which has given rise to conflicting opinions, and, in recent cases, the doctrine is doubted or denied. 16 Eng. Com. Law, 273; Bay's Adm'r v. Tallmadge, 5 Johns. Ch. 305; Lennox et al. v. Prout, 3 449] Wheat. 520. But I am instructed \*by my brethren to announce it as the opinion of a majority of the court that they entertain no doubt of Clarke's right to assert this privilege in this case. They direct me to place this opinion, not only on the basis that judgment was taken on process which did not necessarily afford an opportunity of obtaining the statute certificate, from the uncertainty of the time and place where it was to be entered; or, on the higher foundation, that a former decision of this court, Dixon and Hawk v. Ewing's Adm'rs, 3 Ohio, 280, has furnished a rule, ever since acted upon, and too late to change. Assuming, then, the continuing existence of E. Clarke's suretyship, it gives

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him the privilege of requiring from the creditor a faithful effort to obtain satisfaction from the principal debtor.

The relations between the surety and the purchasers from the principal debtor, depend on other considerations. The surety's privilege is an equity, attaching to and following the debt, and under certain forms and conditions (1 Story's Eq. 477), he may claim in chancery the benefit of every security, or aid, or means of payment, which the law, or the providence of the debtor, or the vigilance of the creditor, has provided for its payment. 4 Johns. 130.

Among these the most obvious is, to drive the creditor to exhaust the judgment lien. His equity attaches to this, and he may thus appropriate all its advantages to his protection. The lien, in this case, upon all the lands which the debtors jointly or separately then held, commenced in April, 1837. It was suspended, but not destroyed, by the writ of error. It might have been defeated by a junior judgment, or a subsequent levy, but it remains paramount to the title of a purchaser, while the judgment continues in force. Norton v. Beaver, 5 Ohio, 178; 10 Ohio, 75. The application of these principles enable Edmund Clarke to screen his own property from the judgment, by throwing its burden on the purchasers.

But both surety and purchaser may justly demand from the judgment creditor the pursuit of the debtor's unincumbered property. If the creditor unnecessarily, and without cause, forego the means of satisfaction from him, he will not be permitted \*to claim it afterward from them. 8 Ohio, 148, pt. 2; 10 [450 Ohio, 76. This leads us to inquire if the Western Reserve Bank has lost its right to recur to the property of the surety, or to the lands sold by the debtors, after the discharge of the first levy.

In November, 1838, the execution of this creditor was levied upon two lots, No. 51, in Ohio City, and No. 95, in Cleveland. The Ohio City lot is described, in the levy, as lot No. 51, 250 feet front on the river, and 200 feet deep. It lies on the west side of the river, but its beginning corner is to be found by the establishment of a very doubtful and unsettled line on the east side of the river. From this uncertainty, and from the peculiar bends of the river, the lot admits being surveyed, with about the same apparent justice, in five or six different forms; but in any of these forms, a part of a lot, having the described front, never belonged

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to the judgment debtors; and water, ten or twelve feet deep, covers a considerable portion of the remainder. There is a slender chance that property so situated can be properly appraised, or brought to a fair or speedy sale, unless the boundaries and title are first established by the chancellor.

Lot No. 95 consists of a lot and block of buildings in Cleveland, and was appraised at \$22,000. It was incumbered by a previous mortgage for \$4,000. An execution may lawfully be levied on mortgage lands, but the sale is attended with great disadvantages and risks. There being no authority, at law, to take an account of the sum due, the land must be appraised, without regard to the mortgage, and the whole avails of the sale applied on the execution, leaving the whole burden of the mortgage to be borne by the purchaser, in addition to the price, unless he can obtain satisfaction for the mortgage from other sources. *Baird v. Kirtland et al.*, 8 Ohio, 22; *Bank of Canton v. Commercial Bank*, 10 Ohio, 71.

The law imposes no duty on the judgment creditor, to encounter the expense or delay of a suit in chancery, to ascertain incumbrances, or define boundaries, of his debtor's lands. His rights **451**] are plain, at law, to have satisfaction of his judgment, \*from anything bound by its lien. They whose interests are subordinate to his, by paying the debt, may substitute themselves for him, and take upon themselves the administration of his remedies, 1 Johns. 409, 430; 4 Ib. 130; but they are not permitted to interfere with his pursuit, unless they can point out property of the debtor, upon which the burden will fall more equitably, and which will yield the means of adequate satisfaction, without embarrassment, expense, or delay. "*La caution qui requiert la discussion (du debiteur principal) doit indiquer au creancier, les biens du debiteur principal, et avancer les deniers suffisans pour faire la discussion.*"

"*Elle ne doit indiquer ni les biens du debiteur principal situes hors de l'arondissement de la Cour Royale, du lieu, ou le payment doit être fait, ni des biens litigieux, ni ceux hypothéqués a la dette qui ne sont plus en la possession du debiteur.*" Code Civil Nap. 2023.

The circumstances of this case, therefore, afford the creditor sufficient ground for abandoning the levy upon the two lots first seized, and for extending their new execution upon any property

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liable to the judgment lien; and the seventeen lots, notwithstanding the sales of a part, are fairly within his reach. The relations among all the defendants seem to us to create no exception to the general rule, that the property of the debtor shall be sold before that of the surety, and that, among the purchasers, the lots must be exposed for sale, in the inverse order of the dates of the purchases.

The exception attempted to be set up, under the law of partnership, does not extend to this case. That arises where a fund is to be distributed, or a burden to be shared, among those whose equities are entirely equal; and the partnership obligations, in such case, fail upon partnership property; and separate obligations upon separate property, not only because the presumption arises, that partnership obligations were incurred to increase partnership property, while the separate liabilities enhanced the property of the individual, but chiefly from the peculiar relations between the partners themselves. *Grosvenor v. Austin*, 6 Ohio, 113. \*Where joint debtors sell lands subject to the judgment [452] lien, they confer an equity upon the purchaser to exempt what he purchases from the burden, until all the other lands, subject to the lien, whether held jointly or severally, shall be exhausted. Subsequent purchasers acquire the same equity, but subordinate to that of elder purchasers, because posterior in time. The distinction, therefore, between joint and separate property, is of no moment in the present case, since the same lien and the same equities extend to both, and leave unimpaired the right of the earlier purchaser to impose the burden upon him whose interests are acquired later than his.

The decree may be taken, declaring the rights of the parties, and providing for a sale, in the first place, of the lands belonging to the principal debtors, in the inverse order of the dates of the purchases from them. Decree accordingly.

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Sperry v. Johnson.

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## GEORGE SPERRY v. WALTER JOHNSON.

A subscription for the construction of a road will be considered as a contract to pay the person by whom it shall be constructed for work and labor.

And when the road is completed he may recover from the subscribers the amount of their subscription, on the common count, for work and labor.

THIS is a writ of error to the Supreme Court of Trumbull county.

M. SUTLIFF, for plaintiff in error.

TOD & HOFFMAN, for defendant.

READ, J. The original action was to recover the amount subscribed by plaintiff in error, for the construction of a road. The subscription paper recites that the road was for the private 453] \*benefit of the subscribers, as well as of the public. The several amounts subscribed were to be paid to Johnson, the plaintiff in the action below, who was to make the road. Sperry, the plaintiff in error, subscribed twenty-five dollars to be paid in labor or stock, in one year, and twenty-five dollars in two years. The bill of exceptions shows that Johnson completed the road, and expended in the works his own money, in the faith of the subscriptions. Sperry, though often requested, never paid his subscription. The action was in assumpsit, upon special and common counts. On the trial, the defendant called upon the court to charge the jury, that if the subscription paper specially declared upon, varied from that set out, the jury must find for the defendant; and that there could not be a recovery under the common counts. The court held, that the subscription paper might, in view of the facts above stated, be received to support a recovery under the common counts.

The judgment in the common pleas was afterward affirmed in the Supreme Court, and this writ of error is brought to reverse both the original judgment and the judgment of affirmance.

Numerous errors have been assigned upon this record, but the consideration of the third assignment will dispose of such of the remainder as it is material to consider. It raises the question, merely, as to the right of recovery under the common counts. If



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the court should regard this, from the facts, as an executed contract, the objection that demand of payment was not made, during the performance or immediately upon the completion of the work, is immaterial, and disposes of the fourth error assigned. And the second error, complaining that the court did not direct a nonsuit, would fail, as the record shows that there was evidence offered in this view to support, at least, the common counts. The court never directs a nonsuit if there be any competent evidence to support the issue. The competence of evidence is with the court, its effect with the jury. The court will never presume to decide upon its sufficiency, however slight it may be; this is for the jury.

\*But did the court of common pleas err, in permitting a [454 recovery upon the common counts?

The plaintiff below had constructed the road, for which the defendant had promised to pay him the amount subscribed. The work had been wholly performed, and money advanced by the plaintiff upon the faith of this and other subscriptions. Is a subscription to pay the money, for the completion of a given work, anything other than a contract for work and labor? If such be its nature, and the work be performed, what remains but the naked duty of the payment to the extent of the amount subscribed? And such being its character, this case comes within the simplest principles distinguishing between special and common counts, and the rule as to executed and executory contracts. If the contract has been executed, and the work performed which it required, and payment is the only question, in an action for its recovery, the common counts are the appropriate and known forms of declaring.

The fact, that a part of this subscription was to be paid in labor or stock, does not affect the case; the obligation was to pay fifty dollars in labor and stock on request; being requested, and not performing the labor, or tendering the stock, it becomes, in law, a mere money demand.

These principles are all recognized and expressly decided, in *Newman v. McGregor*, 5 Ohio, 351. The Supreme Court, therefore, did not err in affirming the judgment below.

Judgment affirmed.

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Woods et al. v. Dille et al.

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**455] \*SUSANNAH WOODS, VERNON GOFF, ET AL. v. ISRAEL DILLE  
ET AL.**

An objection to the examination of a defendant in chancery as a witness, without special order, comes too late at the final hearing and after cross-examination.

Where a parol contract for the purchase or sale of lands is admitted by the defendant in his answer, without relying upon the statute of frauds as a defense, performance will be decreed.

Possession, obtained under a contract of purchase, does not become adverse to the vendor, while the contract is acted upon, and payment made.

What protection will be extended to a bona fide purchaser, without notice, is a question which does not arise where neither party has the legal title.

As between equities, the elder will prevail.

**THIS** is a bill in chancery from the county of Licking.

This bill is filed by the widow and heirs of George Wood, deceased, to compel the conveyance of their interest in a tract of land, purchased in 1811, by George Wood, from Erkurius Beaty and Samuel H. Smith. Wood paid \$400 of the purchase money, entered into possession, and while on his death bed, in 1824, assigned the contract, by an absolute indorsement thereon, to Abram Pence. The object of the assignment, and the agreement of Pence, was, that he should take the contract in trust, for the purpose of paying the residue of the purchase money, receive a deed in his own name, and hold the title for the benefit of the complainants, and, after reimbursing himself, to convey to them their several interests. Pence paid \$190, the balance of the purchase money, and obtained a deed of conveyance, in his own name, from the widow of Beaty, who was administratrix of his estate. He held possession of the land from the time of Wood's death, in 1824, until 1831, when he mortgaged the premises to Messrs. Brice & Co. Under a proceeding to foreclose this mortgage, Dille became the purchaser of the premises, and conveyed to Francis Riley. It is allegation that the mortgagee and the purchasers under the sale had notice of complainants' equity.

**456] \*BIRCHARD, J.** The proof of the payment of \$400 of the purchase money by Woods is clear. The express trust set forth in

the original bill, is substantially proved, if the deposition of A. Pence is to be received as evidence. That is objected to, on the ground that he can not deny the validity of his mortgage, and that, as one of the respondents, his testimony is not competent, inasmuch as it was taken without an order of the court directing his examination. To this last objection it may be said that it comes too late after cross-examination, and especially when we first hear of it on the final argument. It is an objection only to the regularity of the proceeding, and should have been made within a reasonable time. It is not reasonable to allow a party to lie by without objection until a case is submitted to a court of last resort, and then sustain an objection of this nature. There is nothing in the objection to the competency of Pence. He had filed his disclaimer before he was sworn, and, although the circumstances in which we find him placed, by his own conduct, might well impair his credit, yet, corroborated as he is by other proof, we believe he took the assignment of the article as trustee, in the manner stated by the bill.

The next objection is, that the assignment of the contract by Woods, being absolute, the statute of frauds will not permit it to be varied by a contemporaneous parol agreement. The statute of frauds was designed to establish a wholesome rule of evidence. But there are several exceptions which may take a case out of the statute, and leave the contracts of the parties to be enforced in the same manner as if it were never enacted; as when the plea of the statute, if allowed, would consummate a fraud. Such would be this case, if the statute operated to defeat these heirs, who were defrauded by Pence's neglecting to convey to them their several interests in these lands, and by his mortgaging the same as his own property, in violation of their rights as *cestuis que trust*. Pence has, however, admitted the trust on oath, and does not rely upon the statute. As against him, the court could and would decree on this admission. Story's Eq. 590. The same rule will apply to these \*holding under him, with notice of the trust [457 prior to the assignment of the legal title. This is the condition of the respondents, Dille and Riley, unless it be found, as claimed by them, in the next place, that Pence, at the time of the execution of his mortgage to the Messrs. Brice & Co., had a legal title to the premises. It is certain that the deed of Mrs. Beatty only transferred title to her dower estate, and that the fee still remains

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in the heirs of Erkurius Beaty, unless the possession of Woods & Pence, prior to the mortgage, had ripened into a good title by lapse of time.

This question should be tested in the same manner it would have been in an action of ejectment brought by the heirs of Beaty against Pence at the time this bill was filed. If Pence could have defended such an action at law, then the defendant, Dille, could avail himself of the possessory title here. How are the facts? Woods entered under a contract in 1811, and thereby acknowledged the title of Beaty. Pence entered under Woods in 1824, and, after that, paid \$190 of the purchase money to Beaty, thereby treating Beaty as the owner, and acknowledging his holding under him. When did the possession become adverse to the heirs of Beaty? Not while it was consistent with their title. The case of *Boone v. Chiles*, 10 Pet. 177, we apprehend, does not sustain the position contended for by the respondents. But even if the court had held, that possession, under a contract of sale, in a case like this, could become adverse to the vendor at any time while the purchaser was claiming the benefit of his contract, and making payments upon it, we should feel constrained to say that such rule would be different from what has heretofore been held in this state by our own court; and, upon the authority of that able and enlightened tribunal, we should hold that the construction put by our own court, upon a statute of Ohio, is the highest evidence of what is the law of this state.

What protection the law affords to *bona fide* purchasers, for valuable consideration, without notice, has been much discussed by counsel. But as between these complainants and the respondents, 458] Dille and Riley, that question does not arise. \*Each party is without a legal title. As between equities the eldest is preferred, and, therefore, the trust estate of complainants, which dates from 1824, must prevail over any equity arising under the mortgage of 1831. Decree for complainants.

JAMES R. STANBERRY, for complainants.

H. H. HUNTER and H. STANBERRY, for defendants.

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Canal-boat Huron v. Simmons.

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**THE CANAL-BOAT HURON v. CHARLES W. SIMMONS.**

The act providing for the collection of claims against steamboats and other water-craft, authorizing proceedings against them by name, extends the right of recovery to provisions, and all other necessary articles furnished for the use of the boat.

The statute substitutes the boat for the owner, and authorizes suit against it by name, for all money demands against the owner, arising from debts contracted on account of, or for the use of the boat, or for injuries resulting to passengers or property by the boat, or from misconduct of the officers and crew.

THIS is a writ of error to the court of common pleas of Trumbull county.

The action below was against the canal-boat Huron, to recover the price of provisions, furnished to the master, for the use of the boat, by Simmons.

The record shows, that the supplies furnished consisted of sugar, flour, potatoes, bread, and similar articles, to said boat, while navigating the Pennsylvania and Ohio canal, within the borders of the State of Ohio.

It further appears, that the boat belonged to Clarke & Co., of Beaver, Pennsylvania, who had hired Stevens, as master, to navigate the same by the month, and to furnish such articles [459] as are named in the plaintiff's bill of particulars, at his own cost.

The action was prosecuted, under the act providing for the collection of claims against steamboats, and other water-craft, authorizing proceedings against them by name. Swan's Stat. 209.

Motion was made to nonsuit the plaintiff, on the ground that the statute did not extend to provisions furnished the boat.

The court overruled the motion, and gave judgment for the plaintiff.

This is assigned for error.

TOD & HOFFMAN, for plaintiff in error.

TAYLOR & HARRIS, for defendant.

**READ, J.** The determination of this case involves the consideration of the first section of the act for the collection of claims against steamboats, and other water-craft, which provides:

"That steamboats, and other water-craft, navigating the waters

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Canal-boat *Huron v. Simmons*.

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within, or bordering upon this state, shall be liable for debts contracted on account thereof, by the master, owner, steward, consignee, or other agent, for materials, supplies, or labor, in the building, repairing, furnishing, or equipping the same," etc. Swan's Stat. 209.

Do the provisions of the act extend the remedy against the boat, to cases or provisions, and articles of food, supplied for the use of the crew and passengers, to be consumed in the use and navigation of the boat?

The counsel for the plaintiff in error contend that the statute only gives remedy against the boat for such supplies and materials, or articles as are employed in the building, repairing, furnishing, or equipping of the boat, such as become a part of her, and not such as are daily consumed and replaced.

**460]** \*This construction is too narrow to meet the intention of the legislature.

The mischief intended to be remedied, was the difficulty of collecting debts due from the owners of boats, for articles furnished for their use, and for the recovery of damages sustained to persons or property by boats, and by the conduct of the crew.

The difficulty of hunting up the owners of the boat, induced the legislature, in all cases, to substitute the boat, in their stead, and treat her, for the purposes of a suit, as a person, and sell her out to satisfy the judgment which might be recovered. And, further, make the boat responsible for any injury done to any passenger, or property on board.

The ease with which persons navigating our waters could escape legal process; avoid the payment of debts contracted for the use of the boat; and the impunity with which the persons navigating them could inflict injury upon persons and property; the irresponsible character, oftentimes, of the officers and crew; the difficulty of obtaining names, and of identifying persons, induced the legislature, wisely, to make the boat itself responsible for the payment of all debts, and the good conduct of the officers of the boat.

To limit the statute, as the plaintiff claims, would to a great extent defeat this object; for it is known that the supplies for the tables upon our boats is a very important item of expense; and is absolutely necessary for the use of the boat. The legislature could hardly have intended to make them an exception.

But do not articles of provision come within the very words of the statute? The boat shall be liable for debts contracted "by the master, owner, steward, and for materials and supplies, etc., in building, repairing, furnishing, etc., the same." For debts contracted by the steward, for supplies in furnishing the boat. Is a boat furnished that has on board no provisions? What supplies does the steward furnish? Only the chairs, tables, etc., of the boat? All understand, when speaking of supplies furnished by the steward of a boat, that it relates to the supplies of the table. It is his duty to oversee the culinary department; \*to fur- [461 nish and supply the boat with eatables, and all articles for the use of the table. Such being the ordinary understanding of the whole community, when speaking of the steward and his supplies, it can not be presumed that the legislature intended to use these words in any other than their ordinary sense.

But it is said our statute is copied from a statute in the State of New York, entitled "an act directing the mode of proceedings for the collection of demands against ships and vessels," and that they have construed their statute to relate to only such things as enter into and become a part of the vessel. *Johnson v. The Steam-boat Sandusky*, 5 Wend. 510. The words of their statute are: "For work done, or materials or articles furnished in this state, toward the building, repairing, fitting, furnishing, or supplying such vessel." For such provisions and stores furnished within this state, as may be fit and proper for the use of such vessel at the time when the same were furnished. The words "steward" and "supplies" are not in this statute.

It is presumed if the legislature intended to adopt this law, that they were aware of its construction, and inserted the words, "steward" and "supplies" to avoid it; if not, why not adopt the statute in its very words? But our statute and the New York statute are very dissimilar. The New York statute is nothing but a lien law, authorizing the seizure of the boat. Our statute treats the boat as a person, and makes it responsible in its own name for all debts contracted for its use, and for all injuries committed against person or property on board by her officers or crew. We feel ourselves forced to the conclusion, both by the words and the object of the statute, to say it extends to debts contracted for provisions and supplies for the table, and to everything necessary to be supplied for the use of persons on board the

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boat. This statute is equitable in its object, making it the interest of owners to intrust their boats only to responsible officers and crews, and will receive a liberal construction to carry the design of its enactment into effect.

462] \*The boat is treated as a person capable of contracting debts, and becoming liable for money demands. Her responsibility is not in the nature of a lien. Her departure from the place where she contracted the debt is no discharge of the responsibility, but she will be liable to be called upon whenever she may return or be found within our jurisdiction.

This answers the objection taken that the boat had been permitted to depart after she had contracted the debt, and engage in her ordinary business before she was called upon to pay it. This can not be set up as a defense. Judgment affirmed.

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**WILLIAM P. DARST v. ROBERT J. BROCKWAY, HORACE BALDWIN, WALTER D. HERRICK, AND ERASTUS WEBB.**

Relief will be afforded, in a court of equity, against the payment of notes given for a void patent right.

Money paid on such notes may, on the ground of failure of consideration, be recovered back.

An injunction will be allowed against the collection of such notes as may be outstanding and in the hands of the vendors of the patent right.

THIS is a bill in chancery from Pickaway county.

On March 3, 1837, the complainant executed to the defendants four several promissory notes for \$375 each, payable, with interest, on March 1, 1838, 1839, 1840, 1841, in consideration of certain patent rights assigned to him. At the time he executed the notes, complainant received an assignment in these words:

"This indenture, made this 3d day of March, A. D. 1837. between R. J. Brockway, H. Baldwin, W. D. Herrick, and E. Webb, parties of the first part, and William P. Darst of the second part, 463] witnesseth: That the parties of the first part, \*for and in consideration of the sum of \$1,500, to them in hand paid by the



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said parties of the second part, the receipt whereof is hereby acknowledged, have, and by these presents do grant, bargain, and sell unto the party of the second part, his heirs and assigns, the use of the American cement, as patented to Obadiah Parker, for making cisterns, and as patented to Samuel Booth, for making cisterns, and as patented to Horace J. Shumway, for making cisterns, cider vats, tanners' vats, vaults, and reservoirs of all kinds for the purpose of holding large quantities of water or liquors; also, the right of selling or of any way disposing of the right to use said cement, under and by virtue of either of the above patents, as described, in the counties of Putnam, Peoria, Fulton, Schuyler, Iroquois, McLean, Champaign, Macon, Vermillion, Edgar, Clark, Coles, and Shelby, in the State of Illinois, as per Mitchel's pocket-map of 1835, *as fully as we can own the same.*

"R. J. BROCKWAY, [SEAL.]

H. BALDWIN, [SEAL.]

W. D. HERRICK, [SEAL.]

E. WEBB, [SEAL.]

"By their agent, R. J. Brockway."

"Signed, sealed, and delivered in presence of S. A. Moore."

The bill alleges that, at the time the notes were executed, the defendants represented that valid and legal patents had been granted to the several individuals named as patentees, securing to them under, and in pursuance of, the laws of the United States, the right to use, and vend to others to be used, the article called American cement as described in their respective patents. It avers that no valid patents were in fact issued; but, on the contrary, the patents claimed by the defendants were void.

The bill sets forth that two of the notes, given on the purchase of the patent rights, were assigned by the defendants, and complainant has been compelled to pay the amount thereof to the assignees. The prayer is, that the notes, still held by defendants, may be given up and canceled, that the money already paid by complainant may be returned, and for general relief.

\*The defendants, in their answer, deny that any representations were made at the time the notes were given, other than are contained in the instrument of assignment by them executed.

They insist that legal and valid patents were issued, under the

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laws of the United States, to Samuel Booth, Obadiah Parker, and Horace J. Shumway, copies of which they set forth, viz:

1. Patent to Samuel Booth, August 20, 1833, for "a new and useful improvement in constructing the water cistern."

2. Patent to Horace J. Shumway, dated November 19, 1833, for "a new and useful improvement in making water cisterns, cider vats or cisterns, salt vats or reservoirs, fish ponds, tanners' vats, and such other cisterns, vats, vaults, reservoirs, etc., as may be necessary for holding large quantities of liquids."

3. Patent to Obadiah Parker, September 15, 1834, for "a new and useful improvement on Samuel Booth's patent for constructing water cisterns."

To these patent rights for the territory sold to complainant, the defendants claim title by various assignments, set forth in their answer.

Much testimony was taken in reference to the use and novelty, and other merits of the pretended inventions, the material parts whereof are stated in the opinion of the court.

H. H. HUNTER and H. STANBERRY, for complainant:

The patent rights, sold by defendants to the complainant, are void:

1. Because the cement was previously known and in use for the same purposes.

2. Because the cement had been previously known and described, in various prints and public works, before the issuing of the patent.

3. Because various things are included in the specifications which were not discovered, nor first applied to use by the patentees.

465] \*4. Because the pretended discoveries were neither new nor useful, but were frivolous, *Evans v. Eaton*, 7 Wheat. 356; 5 Cond. Rep. 307; *Phil. on Pat.* 272; *Lowell v. Lewis*, 1 Mason, 189; 5 Conn. 307; and the patents being void, the consideration for complainants' notes has failed, and he is entitled to relief against them. *Jones et al. v. Ryle*, 5 Taunt. 486; *Fuller et al. v. Smith et al.*, 21 Eng. C. L. 379; *Wilkinson et al. v. Johnson et al.*, 10 Eng. C. L. 140; *Hayne v. Maltby*, 3 Term, 438; *Earle v. Page*, 6 N. H. 477.

The complainant is not precluded by the clause in the assignment professing to limit the title sold to the extent possessed by

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the defendants, because if that clause be not fraudulent, yet patent rights are chattels, and every vendor of a chattel does warrant his own title.

JOSEPH OLDS and B. F. LEONARD, for defendants, insisted that the patents were valid. 1 Sumn. 485. The complainant acquired by the assignment a good title to the rights intended to be sold, and had a fair consideration for his notes.

But were they invalid the proofs show no case of fraud, but only of mutual ignorance and mistake in both parties, against which equity will furnish no relief. The complainant having given his negotiable notes, which were, in fact, negotiated and put off, the case becomes in the nature of an executed contract.

There was neither fraud nor warranty by defendants, and where, on a sale without fraud or warranty, money is paid, it can not, on the ground of failure of consideration, be recovered back.

They cited *Seixas v. Wood*, 2 Caine, 48, and cases there cited; *Chandler v. Lopus*, Cro. Jac. 4; *Bree v. Holbeck*, Doug. 655; *Taylor v. Hare*, 4 Bos. & Pul. 260; 1 Mass. 65.

Whatever defects might have existed in the patents, they may be cured under the act of Congress, passed March 3, 1837. 4 Story's U. S. L. 2549.

\*BIRCHARD, J. The questions involved in this case are not [466 without difficulty. Although the legal principles embraced in the inquiry may not seem either numerous or difficult, they still are questions not very common to the courts of this state, and their proper application to any given state of facts is far less familiar than principles which, in themselves, are equally difficult, but of more frequent use.

As to what is the law of patents, we have safe guides in the numerous decisions of the courts of the United States; and for the purpose of applying the proof in the case with propriety, it may be well to bear in mind that the following leading principles have been authoritatively settled in construing the act of Congress, under which these three patents were granted:

1. A patent will be void if the thing patented had been in use, or had been described anterior to the supposed discovery.

2. If it include things both new and old.

3. If it be for a mere change of former proportions.

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4. If it be for an effect only.

5. If the same effects were all produced by the application of machinery in separate parts, and the party merely combined them together, or added a new.

6. If it be frivolous or inapplicable to any beneficial use in society.

7. If it be for an improvement, the specification must state specifically in what it consists, and be limited to that; for if it be obscure or doubtful, so that the court can not say which is the particular improvement, and to what it is limited, it is void for ambiguity.

8. If it be for making an old thing out of new materials.

Trying the patents before us with these rules, the first in order of time is to S. Booth, dated August 20, 1833, "for an improvement in constructing the water cistern."

After specifying his improvement in terms, by describing things, which, as he claims, are both old and new, he gives this limit to his claim, viz :

467] \*"The before-described mode of constructing a hydraulic cement cistern, upon a rough wooden stock set up in the pit, without head or hoop, or being jointed, depending entirely upon the cement alone to hold the water."

The whole specification describes at length, and minutely, the digging of a pit, and setting up staves loosely, and the filling them back with earth, laying a brick bottom, and covering the whole with cement.

Now, so far as the cement, as a material of construction, is concerned, or the digging of the pit, or the plastering on wood, or the making of a cistern of water-lime, or the dependence upon the water-lime alone, to hold the water, is concerned, the proof is clear, that all this was before known. There is here no new discovery.

Is there anything new in putting up the walls of these cisterns of wood? The proof shows, that walls had, before the date of this alleged discovery, been constructed in this precise form of brick and other materials; and that this improvement, that is, the pretended new part of it, consists merely in the substitution of one material for another, which is not patentable.

In a letter published in the Utica Almanac, August 15, 1820, the writer describes the water-lime, and, among other things, says,

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"that Judge Wright and Dr. Barrow, think, 'that as it will adhere to shingles and boards as firmly as to stone, it may constitute a covering for houses,' impenetrable to rain, etc. That it will prove useful in forming floors for dairies, cellars, kitchens, etc., and in the construction of "cisterns for holding water."

It will be difficult for an ingenious mind, after reading this, to point to a new principle in this patent, which had not been before described or known, or to say in what his improvement consists. It covers too much.

The patentee may not have been aware of it, but still he was not, as he supposed, the discoverer of anything that he claims. We are unanimously of opinion that this patent is void.

\*The next in order is H. J. Shumway's patent, dated No- [468] vember 19, 1833, for "a new and useful improvement in making water cisterns, cider vats," etc.

After giving his specifications at length, he sums up his invention, and thereby restricts his claim, as follows:

"1. For plastering on earthy walls, instead of stone, brick, or wood, as heretofore or now practiced, and building water cisterns, which water may pass through, and be fitted to all uses:

"2. For applying said cement to the constructing and building of cider cisterns or vaults, tanners' vats, salt vats, fish ponds, and other vaults and reservoirs for holding large quantities of liquids, for which said cement has not been used or known.

"3. For the use of gravel, to stiffen or harden the mortar, which has not been heretofore used in the manner above specified, or in any other, to form a cement, or to stiffen the mortar."

Now, all of these things are included in the patent, and claimed to be Shumway's new discovery.

The right must be maintained to the whole, or his patent covers too much, and is void. On this point, the evidence does not leave us in doubt. His claim for plastering on earthy walls was not new, nor a discovery by him. Joseph A. Roof testifies, that he had a cistern constructed in 1828, at Hagerstown, and the plastering was on an earthy surface; other witnesses corroborate him, establishing this fact. This, therefore, vitiates the whole patent.

But his second ground of claim is not less vicious. For he does not attempt to set forth how he will apply his cement to cider cisterns, and the other vessels named, so that the court, or a me-

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chanic, or the public, could, by possibility, form any judgment whatever, whether it be new or old.

Now it is well known that water-lime has been applied to the construction of vats and cisterns for centuries. That its application in this manner was known to the eastern nations, before the 469] discovery of Columbus; and, for aught we know, \*they may have made use of them for holding large quantities of various kinds of liquids, precisely in the manner intended by the patentee. Mr. Shumway should have stated particularly his manner of using this cement, in order to enable the public to determine the novelty of his supposed discovery, and to use what was before known without coming in conflict with his invention; and also to enable courts and juries to judge whether he had embraced that to which he had no exclusive claim. His specification is silent on this point. This silence is fatal to the patent. It is probable that a minute description would have been equally fatal, by showing that no part of this claim was new.

His third claim is for the discovery of the use of gravel to stiffen the mortar, which the specification describes thus: "If, by means of springs or other causes, greater consistency of mortar is required than can be easily obtained by the mixture of water-lime, sand, and water, gravel may be used, either mixed with the mortar or sprinkled on, after having been plastered." Were this not a false claim, it would be difficult for a court to tell, from the description, wherein this mode differs from the common mode of stiffening mortar by the use of sand and gravel, familiarly known to every mason who has lived within the last century; and this ambiguity also renders void this patent.

The third and last patent is Obadiah Parker's, dated September 15, 1834, for a new and useful improvement on Samuel Booth's patent, first above mentioned.

After specifying what his improvement is, he sums up and limits his patent in these words: "In forming and making the cistern of hydraulic cement, without having any wood or perishable matter left about it, and in the manner above specified, by the means of molds for the body and top, thereby making a more firm and perfect cistern, it being a complete jar; also in making it above ground, and as an improvement on said Booth's patent."

The specification is lengthy, but its substance may be abbreviated. 470] It consists, if the cistern is to be situated below the \*earth's

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surface, of plastering on the outside of a mold placed in the pit, so as to form the circumference of the cistern, and then filling back with earth, and removing the mold. If to be constructed above ground, by using a mold, which, when the mortar is hard, is to be removed.

That this invention is not new is shown by the testimony of George Olden, who knew water-lime, prior to 1834, to have been used in constructing cisterns, both above and below ground, for plastering houses, making tombstones; and Dr. George Boerstler has seen it used in like manner, and for troughs, trunks of mills, etc. But these witnesses have seen it used upon brick, plank, or stone, without the perishable matter about it, so that it would, perhaps, be difficult to say from this testimony alone, that Parker had not made a new discovery in ascertaining that the cement alone might be depended on for forming the walls of the cistern. But when we look back at Booth's patent, which is prior in time, we find him claiming also this identical principle. It is described in Booth's patent, though not claimed, so as to be included in it. Although Parker disclaims anything which was patented to Booth, the fact is fatal to his patent, for he could not claim to be the discoverer of what was before known or described. It is not a more firm or perfect system than Booth's, when his wood has rotted away. And were it not that Parker proposes to remove his wooden mold, before rotting, and Booth proposes to remove it by rotting, the difference between their cisterns, when constructed below ground, would be simply this, the one builds his cistern within his mold, the other without it, which, in point of principle, looks very like a frivolous matter.

Were this, however, insufficient to show the invalidity of the patent, there is, in the last clause, an exclusive claim set up to the right of making cisterns above ground. This he is not entitled to, if, as we are bound, we believe the witnesses, who had, years before, seen and erected above the surface.

He claimed too much when he sought to appropriate that locality to himself, and was guilty of false suggestion.

\*Then, if there be anything new in the whole matter, it is [471 mixed up promiscuously with the old, rendering the patent void for ambiguity, and void, because it includes more than the discovery.

The patents being disposed of, the question turns upon com-  
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plainant's right to the relief sought. We are of opinion that the right is clear.

The notes given were negotiable; the consideration failed; and, though there may have been no fraud in fact, there was, in legal contemplation, a fraud committed, where rights, in patents obtained upon a false suggestion, were sold, and transferred for a valuable consideration, to a person without knowledge of the facts. The notes, also, were liable to be so negotiated as to defeat all just equities, and bar a defense at law. Under such circumstances, a resort to a court of equity, without waiting a suit at law, or for the notes to be passed to *bona fide* holders, was justifiable. Having acquired jurisdiction for a lawful purpose, a court of equity will retain the cause, and do full justice between the parties. Some of the negotiable notes were assigned before they became due, and before the institution of this suit, to innocent purchasers, and have been paid by complainant, to the holders, since the suit was commenced. It is urged that a recovery back should not be had. We think the authorities are otherwise. It is a general principle, that when money, or other valuable, has been paid on a consideration which has entirely failed, it may be recovered back; that, in sales of personal property, there is an implied warranty that the vendor has title to the property. Here, then, the defendant undertook to sell rights, as conferred by patents. A patent, if valid, confers an exclusive right to use, vend, etc., and the dealers in such property (unless expressly stipulating to the contrary), ought ever to be held to the same implications which the law raises against the vendor of any species of personal property.

Decree for complainant.

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472] \*WILLIAM SARGENT v. THE STATE OF OHIO.

After a jury have returned their verdict, have been discharged, and have separated, they can not be recalled to alter or amend it.

In criminal cases, the verdict should be received in the presence of the prisoner, that he may have the jury polled.

The court may, and, in some cases, ought to keep the jury together until their verdict is rendered, and should require the sheriff to furnish them with proper accommodations, and keep them in close custody.



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THIS is a writ of error to the court of common pleas of Sandusky county.

The plaintiff in error was indicted upon two counts; in the first, for uttering and publishing a counterfeit bank bill; in the second, for an attempt to utter and publish said bill. The record shows that, at the September term, the prisoner was put upon his trial. The cause being submitted to the jury, they retired to their room and returned in the evening, after adjournment of court, with a sealed verdict, which was delivered to one of the associate judges, and the jury were discharged. Upon opening the verdict in court next morning, it appeared to be signed by the jurors, and was in these words: "We, the jurors, find the defendant guilty on the first count."

The court proceeding to enter the verdict, the prisoner's counsel objected to any entry as to the second count. The court suggested that "not guilty" might be entered upon that count. The counsel still objecting, the court directed the jury to be called. Upon their appearing, they were asked if they found the prisoner not guilty on the second count, but guilty only on the first. The jury answered that they considered finding him guilty on the first count was finding him guilty also on the second, and that they intended a general verdict of guilty. The court thereupon ordered a general verdict of guilty on the indictment to be entered.

\*A bill of exceptions was thereupon taken. It is assigned [473 on the record for error:

"1. That the jury did not render a verdict upon the whole indictment, but only upon one count, and that the court erred in recalling the jury to give a verdict upon the second count after they had been discharged and had dispersed.

"2. That the court also erred in receiving a general verdict of guilty after the jury had returned their verdict upon the first count.

"3. And in rendering judgment upon a verdict given after the jury had been discharged and were dispersed."

WILLIAM MAY, for the plaintiff in error.

S. B. OTIS, for the state.

READ, J. In both civil and criminal cases, the court may, in their discretion, during the progress of a trial, permit the jury to disperse for the purpose of obtaining food and rest, and may in

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either case direct them to bring in a sealed verdict; but in no case can the jury after they have retired to consider of their verdict, be permitted to separate and disperse until they have agreed. In criminal cases, although the court direct the jury to bring in a sealed verdict, the whole jury must be present at the time of its delivery, in the presence of the prisoner, that they may be polled, if the prisoner desires it. A single judge may, also, in the presence of the prisoner, receive the verdict. After the verdict has been received and the jury discharged, whether it may have been received by a single judge or in open court, the control of the jury and of the court over such verdict is at an end. The court can not alter it, nor can the jury be recalled to alter or amend it. As well might any other twelve men be called to alter it, as the men who were jurors. The office of a juror is discharged upon the acceptance of his verdict by the court.

In Oliver's work upon the rights of American citizens, 284, it is said, "after the trial is over and the verdict is once recorded, 474] \*there seems to be no remedy, even though the jury have made a mistake in their finding, and make an affidavit to that effect. For all mistakes ought to be corrected at the time of trial, and before the verdict is recorded. Courts will not listen to the representations of jurors, contrary to their verdict."

In the case of the United States v. William Keen, 1 McLean, 429, the indictment contained five counts. The jury found the defendant guilty upon the last four, but did not pass upon the first. The court held that the verdict could not be amended so far as to enter not guilty upon the first count, nor amended at all. Judgment, however, was rendered against the prisoner upon the counts on which he was found guilty, the prosecutor being permitted to enter a *nolle prosequi* upon the first count. The court held that this could be done without subjecting the prisoner to a second trial upon that count, as the conviction upon the other counts could be plead in bar. Although in modern times the ancient strictness has yielded to a more enlightened reason, yet no rule tending to insure the impartial administration of justice and the purity of jurors has in the slightest degree been abandoned or impaired. In case of persons charged with high misdemeanors, or when excitement prevails, or when there is any just reason to suspect that improper influences may be brought to bear upon the jury, the court are at liberty, and, in the last-named instance, it would be

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*Lessee of Kinsman v. Loomis and Wood.*

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their duty, not to permit the jury to separate at any time during the trial, up to the time of rendering their verdict, but to direct the sheriff to furnish them proper comforts and keep them in close custody. These matters are wholly committed to the sound discretion of the court, but in no case can it be permitted to recall a jury to alter or amend their verdict after it has been received and the jury discharged. This would jeopardize the jealous guards with which the law has surrounded jurors, to insure the pure administration of justice, and to protect the citizen.

Judgment reversed.

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**\*THE LESSEE OF FREDERICK KINSMAN v. LOOMIS AND WOOD. [475**

A conveyance without warranty works no estoppel to the grantor who afterward acquires title.

A person defending his possession on no other ground than that one of the grantors in the series of deeds had no title, is bound by the recitals of the deed, to the same extent as if he were privy to the grantor.

Where a deed for land in Ohio was made in the State of Connecticut, and there acknowledged before an associate justice of the common pleas of the county in which the land was situated, the acknowledgment is sufficient.

THIS was an action of ejectment, from Lake county.

The plaintiff counts upon a demise from three of the four heirs of John Kinsman, and upon a demise from Jabez Adams. The defendant shows no other title than the possession. The plaintiff's right to recover something is admitted, and the point in dispute is, for what quantity judgment shall be taken.

The case was argued by WEBB, PERKINS and OSBORN, for plaintiffs, and by HITCHCOCK and WILDER, for defendant.

The facts and points will be found in the opinion of the court.

LANE, C. J. In 1796, an association of persons, calling themselves the Connecticut Land Company, purchased of the State of Connecticut, for the price of \$1,200,000, all the land, except the western half million acres, which the state owned within the present limits of Ohio. By the arrangements of the company,

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the title was vested in three trustees, to hold until partition should be made, and to convey to each proprietor, after partition, in the proportion which each had advanced, to make up the consideration.

On October 7, 1800, the trustees of the Connecticut Land Company made conveyances to certain of the proprietors, of whom are Kinsman, Swift, and J. and A. Adams, of portions of the land held by them, among which is lot No. 95, embracing the premises 476] now in dispute. To that portion, which \*passed by this deed to Jabez Adams, and three-fourths of the share of Kinsman, the plaintiff shows a good title, except only for what may be deducted on account of a tax sale, which will be referred to hereafter.

But the plaintiff claims the further interest of Swift. Swift was a proprietor in the Connecticut Land Company. In 1798, Swift, Kinsman, J. and A. Adams, and a number of the other proprietors in this company, whose shares amounted, collectively, to \$84,000, formed a separate association, under the name of the Erie Land Company. The members of the Erie Land Company entered into a deed of indenture with certain trustees, in which they recited that the trustees of the Connecticut Land Company had conveyed to them their respective shares, and that they associated themselves together for the more convenient management of their property, under the name of the Erie Land Company; and in carrying their scheme into execution, they thereupon proceed to convey their respective interests to certain persons to hold as trustees of the Erie Land Company.

This association dissolved itself in 1801, and on the 21st of April in that year, the trustees of the Erie Land Company, retransferring the estate they held in trust, made a deed to Swift, in which they recited that partition had been made, and they thereupon conveyed to him, without warranty, his due proportion of the land. This deed purported to be made in Connecticut, and to be acknowledged before Camden Cleaveland, "one of the justices of the court of common pleas of the county of Trumbull, in the Northwestern Territory."

In 1803, Swift conveyed to Kinsman whatever he acquired under the last-described deed. The right to recover this interest of Swift in this action depends, therefore, upon determining the

nature and extent of the estate, which the trustees of the Erie Land Company had and transmitted to him.

The defendants insist that nothing passed to Swift by this deed, because the trustees of the Erie Land Company had not themselves, at that time, acquired a legal title. The individuals composing that association conveyed to their trustees in \*1798; [477 but the legal title was then held by the trustees of the Connecticut Land Company, from whom it did not pass until 1800. This objection well lies; the deed of 1798, made by those who have no legal title, and being a release without warranty, transfers no legal interest, although the grantor should afterward acquire a legal title; for a release, where no estoppel arises from warranty or otherwise, operates only on their existing rights.

The plaintiff relies upon evidence of legal title, from the production of "the drafts," or "the book of drafts." While the title of the Western Reserve was with the trustees of the Connecticut Land Company, a plan of division was adopted, the names of the proprietors were arranged in classes, and an appropriation of land was "*drawn*" for each class, after the form of drawing a lottery. This act of the association, which affects all the land lying within the territory, held under this title, and embracing ten populous counties, is called "the draft," and the book of the association, where it is registered, is called the "book of drafts." It is urged that a proceeding of so public a nature, affecting so large a quantity of land, and so many individuals, and executed at so early a day, before actual settlement of this part of the state, may be relied on as a legal title. It is doubtless evidence of an equity against the trustees; and it is a matter very generally necessary to show what land is covered by a deed. But the parties to that association never contemplated any further effect from those proceedings, than a partition among *cestuis que trust*; and the trustees in all cases, except those of gross negligence, have conveyed the fee of the separate interests to their respective owners.

If, however, much of the land yet remains unconveyed, the evils which the defendant's counsel apprehend, will, in most cases, be removed by the operation of another principle. Where a *cestui que trust* is found in possession (especially if such possession has continued for a long time) of land which a trustee ought to have conveyed to him, such conveyance will be presumed. Jackson, ex dem. Colden et al. v. Moore, 13 \*Johns. 516; 1 Hill. [478

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Abr. 224. But this presumption will not aid the plaintiff here. It springs from possession; it is raised to support a possession; it has no existence in *his* favor who attacks the rights of one who holds the possession adversely against him.

The recital in the deed from Swift and others, to the trustees of the Erie Land Company, is next to be considered. The preamble sets forth: "Whereas, the trustees of the Connecticut Land Company have, by separate deeds, dated on the — day of —, 1798, reconveyed to the parties of the first part, respectively, all the right, title, and interest, in and to," certain lands, including the premises. Now, the plain effect of such a recital as this is to conclude the parties to that deed, and all who claim through them, from denying the existence of such conveyance as, in this deed, is averred to have been made. The estoppel upon them is as effectual, as if it were from warranty. *Douglas v. Scott*, 5 Ohio, 194; *Scott v. Douglas*, 7 Ohio, 227. And it is too limited a view of the effect of such an estoppel to confine its operation to those only who claim an interest through the deed. A person in possession sustaining his possession by no other title than a denial that a former owner has parted with his right, is not a stranger; he becomes privy in estate to him whose title he retains, and is concluded by what destroys it in his hands; for, if title can be traced by B. to A., and B. can fasten upon A. the incapacity of asserting his right, in consequence of his admission that he has conveyed to B., it is not just that a stranger, standing on A.'s claims only, and relying on no superior right, should be permitted to contest the existence of a fact, which those interested have settled. The law, therefore, wisely attaches the disability of A. to all who maintain his title, and permits such estoppels to be used not merely defensively, but to sustain actions of ejectment. 2 Hill. Abr. 401. The present case affords a proper application of these rules. The sole defense consists in maintaining an outstanding title in Swift; but a fact is shown by Swift's admission, which proves this title has no existence, and that the estate has 479] passed to the \*plaintiff, an admission which binds not Swift only, and his heirs and assignees, but all who seek protection under the shelter of his name.

Since then, by the operation of this doctrine, the title may be traced from Swift to the trustees of the Erie Land Company, the next deed in the series is the reconveyance from these trustees.

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The only defect in this is its acknowledgment. The deed was made in Connecticut and was acknowledged there, but before an associate judge of the common pleas of the county, in the then territory of Ohio, in which the land was situated. We need not now decide if any extraterritorial act of a state judge can be supported, because the validity of deeds executed like this, was established many years since. Lessee of Moore v. Vance, 1 Ohio, 1.

A decision which has become a rule of property, which we must not unnecessarily disturb.

The result of this investigation shows that the law attaches to the several acts of the parties the effects they designed, and invested in Kinsman the interest he purchased from Swift. An investigation of the right of Jabez Adams to the interest of Asahel, is attended with the same consequence; so, that both these estates may be recovered by the plaintiff.

Before these shares can be ascertained from lot No. 95, the eight acres sold for taxes must be deducted from the whole lot; for if defects exist, they have not been pointed out by counsel, and they have escaped our search. Judgment for plaintiff.

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**\*LEWIS EVANTS v. THE ADMINISTRATOR AND HEIRS AT [480  
LAW OF JAMES STRODE.**

Where an instrument, by a mistake of the parties as to the legal effect of the terms used, fails to carry out their intention, relief may be afforded in equity.

A mistake of law may be corrected in equity.

THIS is a bill of review for errors in law. The object of it is to reverse a decree of the Supreme Court of Fairfield county, rendered at the November term, 1840.

The complainant states that, in his original bill, it was set forth that, on July 2, A. D. 1831, the complainant purchased, of James Strode, fifty-five acres of land, at two dollars twelve and one-half cents per acre; paid all the purchase money, amounting to \$116.87½, and took from his vendor his written agreement for a warranty deed, upon a survey, thereafter to be made. That his

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vendor died intestate, without executing the contract; and, on June 5, 1833, defendant George H. Strode, as administrator of his estate, filed his petition, in the court of common pleas of Licking county, setting out the contract; that the intestate died without executing the conveyance; that, at the time of his death, he was seized in fee simple of the land, which had descended to his heirs at law, all of whom were minors, and made defendants. That the said administrator prayed the court to make an order, authorizing the petitioner to convey the land to the complainant, and his heirs. That the minor defendants, by their guardian *ad litem*, filed their answer to the said petition, and, at the September term, 1833, the said court of common pleas made an order, that the said administrator make a warranty deed to complainant, in fee simple, for said tract of land, conveying to him all the right, title, and estate, both in law and in equity, in said tract of land, descended to the said defendants as heirs at law. That on October 481] 8, 1833, the \*administrator undertook the execution of said order of the common pleas, by making a conveyance in pursuance of its provisions; but by mistake, or some other cause, omitted to insert a clause of warranty, but executed a deed purporting to convey only such title as the intestate had in such premises at his decease. That the complainant, being ignorant of the law, and the legal effect of the words used in the deed, and reposing full confidence in the good faith and integrity of the administrator, who represented to said complainant that said deed was made according to agreement, and the order of the court of common pleas, accepted the same, not doubting but his remedy over against the heirs of said decedent, in case of eviction from said land, was complete, in virtue of said deed.

The original bill also states that both real and personal property, to a large amount, descended to the heirs at law of said James Strode, who are still minors, and that one Daniel Arnold, who was made defendant, had become the legal guardian of said heirs at law, and was possessed of a large sum of money, part of the assets of the estate. The bill also charges that, at the October term, in the year 1839, of the court of common pleas of Licking county, by the judgment of said court, the complainant was evicted from said land by the paramount title of the heirs of one John Macum, and put to great costs in the defense of the suit and prayed an account of what was due the complainant, in equity,



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for his purchase money and interest, costs, trouble, and expense, in litigating the title to said land.

The complainant, in his bill of review, further states that the administrator filed his demurrer to said original bill, claiming that the contract, set forth therein, was merged in the deed, and that the remedy of the complainant was at law, and not in chancery; and said minor defendants answered said bill by their guardian *ad litem*. That the cause came on to be heard in the common pleas; the demurrer was overruled, and a decree entered for the complainant. That an appeal was taken to the Supreme Court, and, at the November term, 1840, \*the demurrer was [482 sustained, and the bill dismissed.

Several errors are assigned upon the record :

"1. That the agreement, set forth in the bill, is not merged in the deed, as was supposed by the court.

"2. The court must have supposed the deed to contain a clause of warranty.

"3. That the deed being accepted, through the representations of the administrator, under the supposition that it contained a clause of warranty, the acceptance of the same by the complainant could not have been a waiver of the warranty agreed to be given, as supposed by the court.

"4. The opinion of the court is otherwise erroneous."

ROBERT H. CAFFEE, for complainant :

To determine the questions raised in this case, it becomes necessary to inquire into the mode pointed out by the statute, for the execution of contracts by deceased persons. Swan's Stat. 214, secs. 5, 6; Swan's Stat. 365, sec. 148.

The deed in question was executed by the administrator, under the order of court; the order of court pursued the contract, and required a "warranty deed in fee simple;" the deed recites the order of court, but does not warrant the title in terms.

If the contract requires a warranty, the deed, executed under the contract, whether by the person, in his lifetime, or by the administrator, under the order of the court, must bind the estate to defend the title. If the deed does not "fully execute the contract," the law is not complied with in its execution; the contract is not executed, and is not merged in the deed. There is, then, a clear mistake in the execution of the deed, such as courts of equity will always relieve against. *Hunt v. Rousmanier's*

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Adm'r, 1 Pet. 1, 13, 15, and 8 Wheat. 174; 5 Pet. Cond. 401; Hunt v. Freeman, 1 Ohio, 501; Lynn v. Richmond, 2 Johns. Ch. 51; Williams v. Hobson, 2 Har. & Johns. 474; Churchill v. 483] Rodgers, 3 Monroe, 81. \*And the complainant can not be prejudiced in his rights by his acceptance of this deed.

GEORGE B. SMYTHE, on the same side:

Equity will entertain jurisdiction in all cases where there is not a complete and adequate remedy at law. Snook's Adm'r v. Friend's Adm'r, 9 Ohio, 78; Wright, 61, 731; 3 S. C. Eq. 325, n. It is not enough that there may be a remedy at law; it must be plain and adequate; as efficient to the ends of justice as the remedy in equity. 3 P. Wms. 390; 3 Pet. 210; 4 Wash. C. C. 204, 349; Snook's Adm'r v. Friend's Adm'r, 9 Ohio, 78. And in cases most unfavorable to equitable relief, whenever any difficulties embarrass the legal remedy, courts of equity will interpose. Starr v. Starr, 1 Ohio, 128; 13 Price, 721; 1 Story's Eq. 106; 1 McClell. 505; 1 Ves. Jr. 417.

Where the equitable and legal estates, equal and co-extensive, unite in the same person, from different sources, the former merges. 3 Ves. 121, 339. But does the partial execution of an equitable contract, by one of the parties, merge the contract? I apprehend not, unless the full execution of the contract be expressly waived by the other party.

H. H. HUNTER, for defendants:

The ground of equity asserted is, that the contract stipulates for a "warranty" deed, and that the deed delivered contains no warranty.

Without stopping to inquire what sort of a warranty would be required under such a contract, and assuming that it would be a general warranty, we insist that the complainant would not be entitled to any relief against James Strode, if living, and if he had delivered to the complainant a deed, such as this is, without any covenant of warranty. In other words we claim that where there 484] is no fraud (and none is charged in this case), \*if a vendee, who was entitled to require a deed with warranty, accept one without, he has no remedy against the vendor, although he shall have been evicted by a paramount title.

The law upon this subject is distinctly and well settled. The principles are laid down and the authorities referred to in Sugden on Vendors, 345. The principle is briefly this: "If a purchaser

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is evicted before the conveyance is executed, he may recover back the purchase money, etc. But if the conveyance is actually executed, and the purchaser is evicted by a title to which the covenants do not extend, he can not recover the purchase money either at law or in equity." *Crips v. Roade*, 6 Term, 606; *Johnson v. Johnson*, 3 Bos. & Pul. 162; *Bree v. Holbeck*, Doug. 654; *Dorsey v. Jackman*, 1 Serg. & Rawle, 42; *Frost et al. v. Raymond*, 2 Caine, 188; *Howe v. Barker*, 3 Johns. 506; *Sergeant Maynard's case*, 2 Freem. 1; *Anon.*, 2 Freem. 106; *Abbott v. Allen*, 2 Johns. Ch. 523; 3 Ves. Jr. 235; 2 Bos. & Pul. 23.

As regards the defendant, George Strode, the administrator, who alone demurs, the third ground of the special demurrer is, we think, well taken. The bill admits that he has fully settled and paid over to the guardian of the heirs the assets. There is no ground for relief against him, except so far as may be necessary to control the funds of the estate to satisfy any decree the complainant may be entitled to. This can not be done by any decree against the administrator. He was therefore improperly brought before the court.

JOHN GARRAGHTY, on the same side, insisted that the mistake relied upon does not, in fact, exist. The application of the authorities cited relates to a totally different class of cases.

In the case of *Day v. Brown*, 2 Ohio, 345, it is held that a covenant to warrant and defend, as executors are bound by law to do, is not a personal covenant, and that they are not required to warrant in any form or to any extent. The administrator was under no legal or moral obligation to bind himself personally; and any special warranty set forth in the deed in question would [485 not, under the authority here cited, have been any stricter compliance with the contract of the intestate. All that the administrator was required to do, and all that he could by possibility do, was to execute such deed as would effectually pass all the legal and equitable interest to the estate in question, vested, by descent, in the heirs at law of the intestate. The statute expressly declares that such conveyance shall be binding on all such heirs, and all others interested, in the same manner as though the conveyance had been by the person making such contract in his lifetime. *Swan's Stat.* 214, sec. 6. The administrator, then, having performed his whole duty, by the execution and delivery of a deed of conveyance, which passed the largest interest known to the

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law, and beyond which he was incapable of going, it is obvious that no mistake, either in fact or in law, could, by possibility, exist.

Courts of equity have uniformly relieved against fraud, accident, or mistake. This is one of its distinguishing features. But, in the application of this principle, courts of equity proceed no farther than to enforce the true meaning and intention of the parties, in all such cases where a mistake intervened, contrary to such intention. There must be actual mistake. *Kennedy v. Umbaugh & Reed, Wright, 327.*

H. STANBERRY, for the complainant, in reply:

The acceptance of the deed is admitted to have been under a mistake and misrepresentation of its legal effect. Such an acceptance is not the sort of merger, or, more properly speaking, of performance or execution of contract, which satisfies a court of equity. Where there is an acknowledged mistake as to the legal effect of a deed or other instrument, a court of equity gives relief. *Edwards v. Morris, 1 Ohio, 531; Hunt v. Rousmanier, 8 Wheat. 174.*

It is said if the contract is not merged in the deed, then our relief is, at law, upon the contract. All this would be very true, if 486] a court of law followed the doctrine in equity as to \*mistakes in matters of law; but this jurisdiction is peculiar to equity. A court of law takes a contract or deed as it is, and decides according to its legal effect—not according to what it was intended to be, or, by misconception, supposed to be.

It is also said the administrator ought not to have been made a party. If that were granted, the decree we seek to review is not, therefore, right. If the proper parties are before the chancellor, it is a new doctrine that you can not have relief against them because you have brought an unnecessary party into court with them. Aside from that, it was very proper to make the administrator a party, as it is in all cases where a claim for money is set up against the estate of a decedent.

WOOD, J. This case is by no means new to one member of this court, who was present, and pronounced the decree now sought to be reversed.

I supposed, at that time, it was consistent with the weight of authority, although its result was the most palpable individual in-

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justice. It remains to be seen whether the opinion then entertained is the law of the case.

The allegations of the bill were, that, by the contract the complainant made with the intestate, he was entitled to a deed, with covenants of warranty, for the lands; that the administrator of the intestate, by virtue of the power conferred upon him by the court of common pleas, undertook to make such a conveyance; but, by mistake, omitted to insert a clause of warranty, and represented to the complainant that the deed was in pursuance of the order of the court of common pleas; and the complainant being ignorant of the effect of the words used, accepted the deed, supposing, if evicted, he had a complete remedy upon it, over against the heirs. These averments, in the bill, are admitted by the demurrer; and does the case present grounds for relief in equity? If there was a palpable mistake of fact in the omission of a clause of warranty, which both the complainant and administrator designed to insert, and supposed was inserted, the case would be within one of the \*most familiar heads of equity jurisdiction. [487 But it is not so. The parties both knew the terms, and all the terms, used in the conveyance; both supposed it was in conformity with the authority conferred upon the administrator in pursuance of the agreement, and, in case of an eviction, gave the complainant a right of action upon it against the heirs at law to the extent of the injury, so far as they came into the possession of the assets of the estate.

There was, then, a clear mistake—an error of opinion—as to the legal operation and effect of the words used; and this mistake, it must be admitted, is as fatal to the complainant, and inflicts upon him as essential and unjust an injury as though the parties had believed an actual clause of warranty, in proper form, was inserted in the deed. He has paid his money for his land; he has been evicted by title paramount; and ordinary justice requires he should be remunerated from the property of the intestate. It can not be denied, however, that the mistake in this case is a mistake of law, and if the complainant has a remedy in equity, it must be on the broad principle that, in this peculiar class of cases, such mistakes are relievable. The analogy is strong between the circumstances of this case and that of *Hunt v. Rousmanier's Adm'r*, in 8 Wheat. 174, to which we had occasion to refer in the case of *McNaughten et al. v. Partridge et al.*, at the

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present term, ante, page 223. The rule is, in that case, distinctly and unequivocally asserted that where an instrument fails to carry out the intention of the parties, by reason of a mistake in the effect of the terms employed by the draftsman, there equity will relieve; and the chief justice, in giving the opinion of the Supreme Court of the United States, reviews all the authorities, and lays down the rule that, under such circumstances, a sheer mistake of law is relievable. The same case was again before the same court, and is reported in 1 Pet. 14; and the same doctrine, in this class of cases, is again maintained. In the case of *Champlin v. Laytin*, 1 Edw. 467, cited in Hill. Abr. 146, the superior court of the city of New York uses this language: "A contract 488] entered into, under a mutual misconception of legal \*rights, amounting to a mistake of law in the contracting parties, by which the object of it can not be accomplished, is as liable to be set aside or rescinded as a contract founded in mistake of matters of fact." In the case of *Drew v. Clarke*, Cooke, 374, 380, it is said: "Where a contract is executed under a mistake, in point of law, which mistake is produced by the representations of one of the parties, the other may be relieved, as well as if the mistake was as to matter of fact." 1 Hill. Abr. 146. In 2 Bibb, 449, it is said, however, that "the facts being understood, erroneous deductions of law afford no ground for relief." Ib. 168. The same doctrine is maintained in 1 Johns. Ch. 516; 2 Ib. 51, and 6 Rand. 594. But where different rules of action are laid down, by different respectable tribunals, we ought to adhere to those which are, in our view, most consonant to the general analogies of the law, most conformable to reason, and agreeable to the ends of justice. In our view these require, in the class of cases now before us, that the presumption that every man knows the law—the principle on which some of the cases are founded—should be permitted to be rebutted by proof, and relief granted against a mistake of law.

But it is said, in this case, the only relief which can be afforded would be the correction of the instrument, to conform to the intention of the parties; in other words, the correction of the deed by the insertion of a clause of warranty. This, if it might be effected, would produce more extended and expensive litigation, and the remedy would not, therefore, be as complete and adequate. We have now all the parties before us; can settle all their rights; prevent further litigation, and do complete justice.

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It is urged, also, that if the deed was not executed and delivered in pursuance of the contract, the contract is not merged by the delivery of the deed, and the remedy is upon it, against the administrator, to recover back the consideration for the land. It may, however, be answered that in such an action, if the administrator, as such, be in *esse*, the complainant could not recover the expenses of the ejectment, and the remedy \*would be [489 incomplete; and that, at law, the deed being delivered, although not executed according to the agreement, the defendant would show its acceptance and bar a recovery; for, at law, the deed being accepted, the complainant could not avail himself of any correction of the mistake, and at law the delivery and acceptance of the deed would, *ipso facto*, be a merger of the agreement.

On the whole, a majority of the court have come to the conclusion that the Supreme Court did err in sustaining the demurrer, and in dismissing the complainant's bill, and that the decree of the Supreme Court should be reversed.

Judgment reversed.

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JOHN CREED v. THE COMMERCIAL BANK OF CINCINNATI.

The Commercial Bank of Cincinnati has no right, under its charter, to take, "upon banking principles and usages," more interest than six per centum per annum, in advance, on its loans and discounts.

If more be taken, the note or bill on which it is taken is void.

If an erroneous charge be given to the jury, on an abstract proposition, or on a point entirely out of any case made by the evidence, and the verdict can be supported by the proof made, the judgment will not be reversed.

THIS is a writ of error to the Supreme Court of the county of Ross.

The case was elaborately argued by T. EWING and A. G. THURMAN, for the plaintiff in error, and by CREIGHTON & GREEN, and H. STANBERRY, for the defendant in error. The points made will be found in the opinion of the court.

WOOD, J. This is a writ of error to the Supreme Court of the  
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county of Ross, made returnable in bank. Its object is the reversal of a judgment of the Supreme Court, affirming \*that of the common pleas, on a like writ of error, in a suit in which a recovery was had in the latter tribunal, by the defendants, against the plaintiff in error, for more than \$17,000.

The amount of this recovery, alone, is sufficient to indicate its importance. It is, however, of little moment, in comparison with the rights and interests of the whole moneyed corporations of the state, and their debtors, when the extent is considered to which they will be affected, if not directly, at least indirectly, by a decision in the highest judicial tribunal known to our law. Such adjudication must, of course, become the rule of action, in all future cases which may arise, where the facts are substantially the same, and they are, at the present moment, believed to embrace evidences of claim to a very great extent.

We have, therefore, endeavored to bring all our energy into this investigation, to understand the facts, to apply the law, as we are enabled to find it exists, both from our own researches and the lights afforded us by the counsel, who not only prosecute, but also defend, with ability and zeal. Amidst the storms of party conflict, and the commotions incident to party animosity, originating, whether justly or unjustly, doubtless, in an honest conviction of the hostility of banks to the welfare of the community, if we have been able to hold the scales of justice with a firm and steady hand, our duty is performed, and we are not responsible for the result.

The papers in this case are voluminous, but the important inquiry is within a narrow sphere, and embraces nothing intricate or difficult of solution.

The question is, did the court of common pleas err in its proceedings, in the rendition of the judgment affirmed by the Supreme Court? If so, it follows, as a necessary result, that the judgment must be reversed. Or, in other words, did the Supreme Court err in the affirmance of that judgment? That it did err is the only error assigned, and in stating the proposition in either alternative, the record spreads before us the same ground of inquiry.

**491]** \*The action was assumpsit, founded on four bills of exchange; the declaration containing also the common money counts. The first of these bills bears date at Cincinnati,



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August 1, 1837, at sixty days' date, drawn by Cox and Eckart, on J. Cox, for \$2,000, payable at the Bank of Louisville, to the order of John Creed, and by him indorsed to the Commercial Bank.

The second bill is by the same drawers, on J. Cox, of the same date, August 1, 1837, at the same place, for \$3,000, at ninety days' date, payable at the Bank of Kentucky, Louisville, to the order of Creed, and by him indorsed to the Commercial Bank.

The third bill is by the same drawers, on John Cox, New York, bearing the same date, at the same place, for \$10,000, payable at four months, at the Bank of America, New York, to the order of George F. Ball, indorsed to Creed, and by him to the Commercial Bank.

The fourth is drawn by Cox and Eckart, on John Cox, New York, dated Cincinnati, January 30, 1838, for \$5,829.47, at four months, payable at the Bank of America, New York, to the order of John Creed, and by him indorsed, in like manner, to the Commercial Bank.

To the declaration the plaintiff in error filed the plea of the general issue, and the cause was submitted to the jury, in the court of common pleas. A bill of exceptions was taken, during the progress of the trial, by the counsel for the plaintiff in error, and to that we must look, *exclusively*, for the history of the case, to sustain the assignment of error, for, aside from this, there is no error in the record.

To this bill of exceptions we shall only refer for the important facts on which our conclusions are based, and leave the residue for a more convenient season, and for those whose tastes are curious in judicial history, to peruse at leisure, and this of necessity, for it contains *twenty-three pages of closely written folio*! It appears from it, the ground relied upon as a defense, in the court of common pleas, by the now plaintiff in error, was, that there was between the Commercial Bank and \*the drawers, at the [492 time of the sale, or discount, of these bills, some corrupt agreement or understanding, or some shift or device, by which more interest than at the rate of six per centum per annum, in advance, was reserved by the bank, as interest, for the use or loan of its money; and assuming this as proved, it was then claimed, and is again urged, that these bills, thus bought or discounted, were void from a defect of power, in the defendants in error, to enter into any such contract. The Bank of Chillicothe v. Swayne et al., 8

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Ohio, 257, is cited as an authority. With the principles settled in that case we are entirely satisfied. They rest on safe and solid foundations, and sound policy requires they should be asserted and maintained. According to them, life and health, and energy and vigor, are only conferred upon a corporation by its charter. No natural rights are recognized; its powers and privileges must be expressly conferred. None other are incorporated into existence, unless implied from strong necessity, in order to carry out those which are expressly granted. In the case of *Bank of Chillicothe v. Swayne et al.*, the bill was discounted by the plaintiff, and more than six per cent. per annum reserved, in advance, as interest, against an express prohibition in the charter. It is clear that *there* was a defect of power, and the whole transaction void. Nor would this be a new principle, where all the parties are natural persons, that a bond, bill, or note, purporting to be executed by A., should be declared void, because B. was not authorized to affix the seal or signature of A. We do not think it advisable to either enlarge or limit the principles fixed in the case above cited, but leave it on its own foundation for support.

The question then is, does this case come within it? The counsel for the bank contend that it does not. They urge that a charter is a contract, and by it the rate of interest is not fixed which they may receive on their loans and discounts. It is true, such express provision limiting the rate of interest, as exists in nearly every other bank charter in the state, either by mistake or design, was omitted in this, and in lieu thereof, it is provided, 493] in the grant of power, that the corporation, among other things, may discount bills of exchange on "*banking principles and usages.*" As other banks were then supposed to be limited to six per centum, and were so, mostly, by express prohibition to receive more, it is probable the legislature thought it a part of the "*usages and principles of banks,*" to discount bills of exchange at the rate of six per centum interest, in advance, and no more. In any event, it could never have been the design that the limit of exaction by any moneyed institution should only be fixed by its inordinate cupidity, and thirst after gain.

We should find no difficulty, were it necessary in order to determine this case, in arriving at the conclusion, from the terms "*principles and usages,*" as employed in this charter, that the legislature intended to limit the discount on notes and bills, etc., to

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six per centum, in advance. But, if wrong in this, and if interest is entirely overlooked in this charter, it is clear it falls within the general law, which is applicable to natural persons, and can legally receive no more, nor could any usurious excess of interest be recovered by this corporation; and, placing a bank charter on the footing of a most solemn contract, unalterable by subsequent legislation, it is not violated by a law prescribing a rate of interest, which has not been fixed by its charter, but wholly omitted. A majority of the court, therefore, design expressly to be understood, that the Commercial Bank, under its charter, occupies the same ground, as the Bank of Chillicothe was found to occupy in the case against Swayne and others, when the facts are the same. It can receive no more than six per centum per annum, in advance, as interest on its loans and discounts; and when it does receive more, there is a defect of power to make a valid contract.

Let us then look to the testimony, which is contained in the bill of exceptions, and see whether this transaction is brought within the case of the Bank of Chillicothe v. Swayne et al. Before proceeding to that evidence, however, it may be remarked, that after the defendants in error rested in the court of common pleas, having given in evidence the four bills of \*exchange counted [494 upon in the declaration, Creed, the defendant below, offered in evidence to the jury seven other bills of similar character and amounts, a part or all of which, it was claimed, formed a connected transaction with the bills in suit, which were given to renew prior paper, and also an abstract of an account current of Cox and Eckart with the Commercial Bank. This evidence went to the jury without exception, and it was claimed that it conduced to prove the issue made, that the Commercial Bank, when the bills in suit were purchased, reserved more than six per centum, in advance, as interest.

Hall was then called by Creed, the defendant below, as a witness, and testified, that he had been the cashier of the Commercial Bank since the year 1836; that on the 30th of July of that year, the bank purchased of Cox and Eckart two bills, for \$5,000 each, dated on that day, at four months, drawn on Brunson and Colt, payable at New York, and the only discount charged was the interest at six per cent. per annum. These bills were not paid, but protested and returned. They were paid in Cincinnati, on March 21, 1837, with the addition of six per cent. damages, and eight dol-

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lars each, for costs of protest, postage, and interest at the rate of six per cent., per annum, from the date of maturity until paid. On November 29, 1836, the bank purchased another bill of Cox and Eckart, on New York, indorsed by Creed; the proceeds were applied to pay the first draft, and this was paid at maturity, in New York; they are consequently out of the case. On February 8, 1837, the bank bought of Cox and Eckart a bill drawn by Joline, indorsed by Creed, Ball & Co., on Cox and Eckart, payable in New York, dated January 25, 1837, six months after date, for \$10,000. This draft was protested in New York, and paid in Cincinnati, with interest, after maturity, protest and postage, and three and one-half per cent. exchange, being the difference of exchange between Cincinnati and New York, on March 21, 1837. Hall then gives the history of the purchase of the other 495] bills, including those in \*suit, and swears that no more than six per centum interest was reserved, with the regular rates of exchange, from time to time, between Cincinnati and the places where drawn payable.

On some occasions, the damages due the bank on protested bills, in renewing paper, were received, and no exchange charged. Mr. Hall never heard of any agreement, before the maturity of either of the bills, that the same should be extended. On some occasions, Cox and Eckart stated they had shipped produce to those on whom the bills were drawn, to meet them, and that they would be paid at maturity. That the transactions on the part of the bank were intended to be in good faith, and it was always supposed the bills would be met at maturity. On the Louisville bills, the bank charged six per centum interest per annum, and one per centum exchange, which was the market value of such bills, and the same rate at which they were purchased by other banks in Cincinnati; although exchange between the two places, Cincinnati and Louisville, on sight bills, was at par. There are other depositions, several letters, etc., which appear from the bill of exceptions to have gone to the jury without objection. With this testimony on a writ of error, and no exceptions to its admission, we have nothing to do in ordinary cases. It was probably spread out on this record, to show the true character of the litigation, and to enable us fully to comprehend the true import of the charge of the learned judge, who presided on the trial in the court of common pleas. To the charge as given, and the refusal to

charge as requested, the exceptions alone were taken; it was the origin of the supposed errors, for which the writ of error was prosecuted in the Supreme Court of Ross county, and for the affirmance of which judgment of the common pleas, by the Supreme Court, this writ of error is before us.

The record then shows that, the evidence being closed, the counsel for Creed asked the court to instruct the jury, that if they found any of the bills of exchange were negotiated by the bank on any contract or understanding, by which the bank was to have more than six per centum per annum, in advance, \*for the [496 loan of any money, under whatsoever name it might be taken, if it was received in fact, for the loan, at a rate of interest exceeding six per centum per annum, any bill of exchange made to carry out such contract was void.

2. That if the jury should find the bills of exchange, executed on August 1, 1837, were made in consideration of such usurious bill, in whole or in part, or formed a part of the consideration of the contract for the negotiation of said bills, or any of them, that such bill was void, and the bank not entitled to recover on such bill or bills of exchange.

3, 4, 5, 6, and 7. The court were asked to charged the jury, in substance, the same in respect to each of the four bills in suit; and, that if any of the former bills were void, for any of the aforesaid reasons, and they formed any part of the consideration for the bills in suit, such bills were also void; and whether such void bills immediately or remotely formed a part of the consideration for the bills in suit; and whether such excess of interest was taken immediately on the bills in suit, or prior bills which formed a part consideration for the bills in suit, or whether such excess of interest was taken in the name of exchange, or otherwise, the bank was not entitled to recover. That any custom of the banks in Cincinnati, by which they take more than six per cent. per annum is void.

These instructions together, *as prayed for*, the court refused to give; but charged that the clause in the charter which permitted the defendants in error to discount upon *banking principles and usages*, was as binding on the Commercial Bank, as the clause in the charter of the Bank of Chillicothe was upon it; and if the Commercial Bank violated its charter, in discounting a bill of exchange, not according to banking principles and usages, such con-

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tract would be void. But these principles and usages were the general principles throughout the commercial world, and not those of the banks of Ohio morely. That the usages of the banks of Cincinnati, where the Commercial Bank was situated, were chiefly to be regarded; but the usages of banks in the interior, 497] such as Lancaster and Circleville, were entitled to \*but little weight. That the fact that such usages existed in Cincinnati, and not the legality thereof, was to be regarded; and if, by the established usages of the other Cincinnati banks, more than six per centum was taken on their loans, the Commercial Bank had the right to take more also.

The court also charged, that the law, fixing the rate of interest, prohibited the Commercial Bank from taking more than six per centum; and if they took more, the excess was forfeited; and if they took more than they were authorized to do by the usage of banking, they forfeited only the excess, if they believed at the time they were not exceeding banking principles and usages; but if they took such excess against the usages of the banks of the city, the whole transaction was void. This is substantially the charge of the court, and, if erroneous, and the plaintiff in error *may have been prejudiced by it*, the Supreme Court for Ross county erred in affirming the judgment.

In order to understand the nature of the defense and the application of the charge, I have before remarked that the evidence was spread out in the bill of exceptions. It is reasonable to suppose all the evidence in favor of the defendant below is before us in this case, and the whole charge may be disposed of in few words. A large portion of it, if erroneous, is so by being too strongly in favor of the plaintiff in error, and of this, *he has no right to complain*; and as to those parts of the charge which may be supposed to operate against the plaintiff in error, to wit, that if the Commercial Bank took more than six per centum, and acted in conformity with the usages of the other banks, and such usages were illegal, the illegality could not be inquired into; that if they violated the usages of banking, and did it in good faith, the excess only was void; if in bad faith, or in violation of banking principles and usages, the whole transaction was invalid; and that the jury must principally regard the usages of the banks of Cincinnati, and look but little to banking through the commercial world, etc., it is perfectly clear the whole of it is entirely out of any case

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Commercial Bank of Cincinnati v. Reed.

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made by the evidence. There is not one particle of testimony conducing to prove any such facts. The evidence \*is per- [498] fectly conclusive, that no more than six per cent. interest was received; and if certain rates of exchange were received, they were the fair market rates at the time, and often in lieu of damages to which the bank was entitled on the protest of the bills, and for a less amount, when the bank might have received both. There was no evidence of any illegal customs, usages, or principles; no evidence of any excess of interest; and to decide that the Commercial Bank can not deal in exchanges, and either buy or sell at the fair and honest market value, would, in our view, contravene the whole current of decisions in other states; and there seems to us to be nothing else in reality, in the case at bar.

The judgment of the Supreme Court is affirmed.

Judgment affirmed.

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THE COMMERCIAL BANK OF CINCINNATI v. JOHN REED.

Six per centum damages on a protested bill of exchange, addressed by mistake to the defendant in Ohio, instead of Philadelphia, where the bill was payable, can not be recovered back, nor be set off against a subsequent claim, if paid with a full knowledge of the facts.

Such damages, if settled and reserved by a bank out of a second bill of exchange, discounted to pay the first, is not evidence of a reservation of more than six per centum per annum, in advance, on its loans and discounts.

THIS is an action of assumpsit, from the county of Clinton.

The case was submitted to the court, on the last circuit, in Clinton county, and reserved here for the consideration of all the judges.

The declaration counts upon a bill of exchange, drawn by James Reed and Absalom Reed, on the defendant, John Reed, dated on January 2, 1841, at Cincinnati, for \$3,666.99, payable to the order of Eli Hall, at the Bank of Philadelphia, four months after the date thereof. It is averred, that the defendant accepted this bill of exchange, and that the same was \*indorsed, etc., and [499] came to the possession of the plaintiff. There is also a second special count on the same bill, with the common money counts.

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Commercial Bank of Cincinnati v. Reed.

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To this declaration, the defendant filed a plea of the general issue, with a notice of special matter in bar of the action.

Under the plea and notice, the defense set up is, that the bill of exchange in question was discounted by the plaintiff, under a corrupt agreement, and more than six per centum reserved, in advance, as interest, and that, therefore, the bill in question was void. The facts in proof are stated in the opinion of the court.

WILLIAMS & JOHNSTON, with WRIGHT, COFFIN & MINER, for plaintiff.

THOMAS CORWIN, for defendant.

WOOD, J. In the case of Creed against the Commercial Bank of Cincinnati, at the present term, it was decided by this court, that the Commercial Bank had, under its charter, the capacity to reserve no more than six per centum per annum, in advance, on its loans, and if a higher rate was reserved as interest, either directly or indirectly, or by any shift or device, the security taken would be void; and the reasons for that opinion are fully stated in that case. A majority of the court see no reason to change the ground there assumed. It is necessary, therefore, to ascertain the facts. From the depositions on file, it appears the Reeds, who are parties to this bill, were drovers of cattle to the Philadelphia market, and, for that purpose, occasionally borrowed money of the plaintiff, and made their paper payable in Philadelphia. The bill in question was bought by the plaintiff. Seventy dollars were reserved as interest, being less than at the rate of six per centum per annum, for the time the bill had to run. The proceeds of the bill were paid on the defendant's check.

The plaintiff's clerk testifies, that the plaintiff had before purchased a bill drawn by Absalom Reed, dated July 8, 1840, for \$3,500, payable at four months, in Philadelphia, and accepted by the defendant, John Reed, and by mistake addressed to him in Ohio. This bill was protested for non-payment. The costs and interest, after maturity, \$33.65; \$210 for six per centum damages; and \$3,500 for principal in the bill; in the aggregate, \$3,743.65 was computed and paid from the avails of the bill in suit, which was discounted for that purpose, by John Reed, the defendant's check for \$3,595.65, and \$150 in cash.

In the language of counsel, we may inquire, where is the usury? It is said to exist in the reservation of the \$210, on the discount



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Commercial Bank of Cincinnati v. Reed et al.

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of the bill in suit, as six per centum damages. It is true these damages could not be recovered at law by the bank, because the bill was addressed to the drawee and acceptor in Ohio, instead of Philadelphia. In answer to this, the proof is, that by the agreement of the parties, the bill was to have been drawn on Reed, in Philadelphia, and a sheer mistake prevented. There was, therefore, a moral obligation, after the protest of the bill, to rectify the mistake, and pay the damages; and with a full knowledge of these facts, and supported by this moral consideration, it was agreed they should be paid on the discount of the bill in suit, and were applied accordingly. It does not appear to us that this evidence, by any means, sustains the defense. It is, however, urged by counsel, that these damages should be deducted from the amount of the bill, if their receipt does not constitute usury, and avoid it *ab origine*.

We think differently; upon a moral consideration, if money is paid, or upon an agreement for usurious interest, if it be executed, and the interest once advanced, the parties are *pari delicto*, and it can not be recovered back.

Judgment must be entered on the verdict.

Judgment for plaintiff.

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**\*THE COMMERCIAL BANK OF CINCINNATI v. ABSALOM REED [501  
ET AL.**

ACTION of assumpsit from Clinton county.

WOOD, J. This suit was on the same bill of exchange. The same defense is presented as in the case of the Commercial Bank of Cincinnati v. John Reed, reported above, and the decision in that case determines this. Judgment for plaintiff.

WILLIAMS & JOHNSTON, with WRIGHT, COFFIN & MINER, for plaintiff.

THOMAS CORWIN, for defendant.

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Seely v. State of Ohio.

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**MORRIS SEELY v. THE STATE OF OHIO.**

A special act, authorizing the complainant to file a bill, as in chancery, against the state, and requiring the cause "to be decided upon principles of justice and good faith," will be construed as intending to relieve the complainant from all technical objections that might arise in a proceeding according to the known usages of law and chancery, and as conferring power upon the court to examine the claim in the spirit of liberality, which would be proper for the general assembly to exercise.

Anticipated profits, or speculations in real estate, can not be recovered as damages on a breach of a contract.

Actual expenditures, under the contract, can be recovered.

THIS is a petition in the nature of a bill in chancery against the State of Ohio, under a special act of the general assembly, passed March 12, 1839, 37 Ohio L. 220, which provided: "That Morris 502] Seely, of the county of Montgomery, be \*and he is hereby authorized and empowered to institute, commence, and prosecute an amicable suit, by filing his petition in the nature of a chancery proceeding in the court of common pleas, within and for the county of Montgomery, at any time after the passage of this act, against the State of Ohio, for the recovery of any and all such damages which he may have sustained by reason of the non-performance upon the part of the state of any contract entered into by her duly authorized agents with the said Morris Seely, which suit in chancery, so commenced, shall be investigated and decided by said court upon the principles of justice and good faith, and upon the final hearing of the cause, upon the principles aforesaid, the court shall render such decree as, in their opinion, the principles of justice and good faith demand."

There was in the act a proviso: "That nothing in this act contained shall be so construed as to recognize the existence of any contract between the State of Ohio, or her duly authorized agents, and the said Morris Seely, on which said Seely should be entitled to recover damages."

In January, 1829, Morris Seely made a proposition to the board of canal commissioners to "sell to the State of Ohio any quantity of land, not exceeding ten acres, at such price as the board of canal commissioners, or the acting canal commissioners, should

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Seely v. State of Ohio.

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consider a fair price, at such point or points as he or they should deem the most eligible for the control of such water power, or he would lease the water privileges at \$400 a year for the first ten years, and subject to a reappraisement perpetually.

"Your immediate attention to this proposition will be gratifying to me, inasmuch as it would enable me, in case we should agree, to facilitate the excavation of a basin, and, I would beg leave to add, advance the great interests of the state generally, and those of the town of Dayton in particular."

To this proposition the following reply was made:

"Office of the Canal Commissioners, Columbus, January 15, 1839. The proposition of Morris Seely to convey to the state, for the use of the canal fund, one or more acres of ground, or \*out-lots number three or seventeen, in the town of Dayton, [503 for the purpose of selling or leasing, on said ground, the water which passes from the feeder into the canal below was considered; whereupon, it was resolved, that the board will purchase of said Seely one or two acres of ground, at the rate of \$500 per acre, to be selected by the acting commissioner, provided the title is made free from incumbrances, and the said Seely, or others interested shall make a cut from the canal, and upon the same level, up to a convenient point for the use of the water upon said Seely's ground for the free flow of the tail-race water into the canal." To which reply is added, "I concur in opinion with the board of canal commissioners in relation to the purchase of the lot or lots mentioned in the within agreement, and my assent to the contract is hereby given. February 20, 1829. A. Trimble."

Two and a half acres of land were selected, a conveyance made to the state, and the purchase money paid.

Seely went on to construct the race, and, with a view to speculation, made along the line of the race large purchases of land, which was laid out in town lots.

In November, 1829, the race being in a great measure completed, the commissioners, at the request of Seely, advertised a sale of water power. The sale was enjoined, upon petition in chancery, against Micajah T. Williams, canal commissioner, by Cooper's heirs, which injunction continued in force until dissolved by the court in bank. *Cooper v. Williams*, 4 Ohio, 255.

In the meantime Seely had become insolvent, and made an assignment to the commissioner of insolvents. The race was left

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uncompleted, the work abandoned, and the speculation failed. At the session of the legislature in 1833, '34, Seely petitioned for relief, and \$5,000 were granted to, and accepted by him from the state.

In March, 1839, Seely being a member of the general assembly, the special act authorizing him to file a petition against the state was passed.

504] \*Under this act, a petition was filed, setting forth the transactions between Seely and the board of canal commissioners, alleging that he had been induced, by representations of the board or some members thereof, to sell his land to the state, and to undertake the construction of the race or canal, in which he had actually expended nine or ten thousand dollars; that he had also, in consequence of said representations, made large purchases of real estate, with a view to sale for profit, and from which, if the work had been completed, and the water power sold out by the state, as contemplated, he would have realized many thousand dollars profit.

That, in consequence of the injunction and unnecessary delay, he had been involved in pecuniary embarrassments, and had suffered great losses, and the state having abandoned the original design of selling out the water, as contemplated, he had been deprived of all his anticipated profits, etc., etc. Compensation was claimed for the work and expenditures on the race, for the value of the land occupied by the race, which was now abandoned, and for the loss of anticipated speculations on lands and town lots. The cause had been referred to a master, and much testimony taken on the part of Seely, in respect to the value of the work, and of the land occupied by the race, and of the probable speculations, which, on certain contingencies, Seely might have realized.

And, from the master's report, two estimates were presented.

The first claiming to recover for—

“The loss only sustained by the increased value of the lots, not being realized by Seely:

“The loss of profits on 60 lots, on plat 4, bought of Brabham, and sold by Seely, on July 23, 1829,	
and interest, - - - - -	\$ 8,104 66
“To damages by loss of increased value on 188 lots,	29,727 50
“Loss of increased value of one-third of 321, on plats 3, 5, and 6, - - - - -	13,910 00
	<hr/> \$51,742 16”

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\*The second, claiming for "loss sustained by the complain- [505  
ant by costs of excavating lands for right of way, depreciation of  
value of lots, abating the \$5,000 paid by the state, with interest;  
also, the actual sale money of the Brabham lots, abating the de-  
preciation of \$50 on each lot subdivided, sixty in number.

"To balance of cost of excavation, with interest, after deducting the \$5,000 appropriated, with interest,	\$8,308 34
"To the amount of sales of lots got of Brabham, 60 in number, with interest from the day Seely sold, on July 23, 1829, to May, 1842, - - -	8,104 66
"To value of land occupied by highway and canal, 8 75-100 acres, at \$200 per acre, with interest,	3,062 50
"To loss occasioned by the depreciation of all the lots,	17,750 00
	<hr/>
	\$37,225 50
"Deduct depreciation on 60 of Brabham's lots, \$50 per lot, - - - - -	3,000 00
	<hr/>
"Amount of decree under this calculation, - -	\$34,225 50"

An answer was put in, on the part of the state, in which it was  
insisted that no other contract was made by the state or its agents,  
with Seely, than for the purchase of the two and a half acres of  
land, for which it was admitted he was paid at the time. That the  
digging of the race, and the purchase of lands, and laying out  
town lots, was his own act, in view of anticipated profits, for the  
failure of which the state was in no way accountable. That even  
supposing such contract had been made, the completion of the race  
by Seely, was a condition precedent, which was never complied  
with. That had such contract existed, and were there no default  
by him, he had received from the state \$5,000, in full satisfaction  
and discharge of all claims. And, finally, that having made an  
assignment to the commissioner of insolvents, \*after the [506  
alleged breach on the part of the state, whatever interest he had  
passed to the commissioner for the benefit of his creditors, so that  
in no possible view could Seely have any right to recover.

P. P. LOWE, ODLIN & SCHENCK, and THOMAS CORWIN, for Seely.  
J. CRANE, D. PECK, and E. M. STANTON, for the state.

BIRCHARD, J. This proceeding is had under a private act of the  
general assembly, which authorizes complainant to sue for any  
damages sustained by reason of the non-performance of any con-

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tract entered into with him by the duly authorized agent of the state, and requires the court "to decide the controversy upon the principles of justice and good faith."

The first difficulty which we meet in the investigation of this case, arises upon a construction of the special act conferring jurisdiction. Are we required to be governed by the known rules of law and equity as applied between man and man, or by the principles of a more enlarged rule of moral right, untrammelled by technical rules?

This is made a question. If the object was to leave us to determine the merits agreeably to the well-recognized rules of chancery and law, it may be presumed that no specific directions would have been found in the act, or, at least, that words would have been used of a definite and certain legal import. Instead of which we are directed to observe no other guide than justice and good faith. Cases daily arise between individuals, in which strict morality imposes higher obligations upon a party than could be enforced in chancery. In some of them the obligation of good faith, as the words are usually understood by mankind, would require performance. As if one were to make a naked agreement to aid another, which would lead to a great expenditure of money in expectation of that aid, and after the expense incurred, the promise should be violated. This would give no right of action in [507] any court, \*yet no moralist would pretend that good faith had not been broken.

Whatever may have been the motive of the general assembly in conferring this jurisdiction upon us—whether it was done for the sole purpose of bringing into exercise the facilities provided for courts in collecting facts, or for any other purpose—it seems to us that we are made arbiters by the act, between the state and a fellow-citizen, by a jurisdiction specially conferred, to be exercised *sui generis*, and that it is our duty to be governed by those liberal principles which should be the guide of a committee of either house of the general assembly. Under these views of the power conferred upon us and of our duty, we feel untrammelled by the technicalities of the law and at liberty to adjust this controversy upon as liberal principles as could the general assembly, had the duty not been delegated to us. Guided by these rules, the first inquiry is, did any of the duly authorized agents of the state enter into a contract with complainant, which has not been kept and

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performed in good faith, whereby he has sustained damage? There was a contract for the sale of two acres of land. The land was conveyed pursuant to it. The object of the complainant in vending this property was to secure the flow of the surplus water of the canal through complainant's adjoining land; and it was understood, between him and the agent of the state, that he should construct a tail-race at his own expense, looking to the enhanced value of the lands, to be caused by the flow of water, for his remuneration. The essence of the agreement, and the inducement held out by the state, although not embraced in the deed, was that the surplus water, to the amount of two thousand cubic feet per minute, should be turned into this channel; and, aside from technical rules, we ought to treat this engagement as a part of the contract. Seely had a right to expect the surplus water would be turned in that direction. It was, in part, the consideration which induced him to make the sale, and the sole consideration for expending money in purchasing and dedicating the ground occupied by the basin and race, and in excavating the same.

\*For three years the state was enjoined from complying. [508 with the agreement on her part, and when the injunction was dissolved, justice and good faith required that the surplus water should have received the direction originally designed. But for some probable or sufficient cause it was deemed to be for the public interest to do otherwise. No legal contract was violated in so doing, and yet justice and good faith to Seely were disregarded, for he was left with a useless piece of canal on hand, and all hopes and means of realizing the costs and expenses of constructing it were destroyed, save that which he is now pursuing.

We believe that compensation should be made to him. That is, if we were acting as legislators we would support, by our votes, a bill passed upon these principles.

Claims have been presented to the amount of from \$30,000 to \$50,000, for the losses sustained in the depreciation of real estate, purchased with a view to speculation, and now rendered of little value, owing to the diversion of the water of the canal, contrary to the understanding of the parties. These items of the master's report must be rejected. It is possible that profits to this amount might have been realized by the complainant if the state had fulfilled the engagement of the canal commissioner. This, however, could have only happened by sales of property at an increased

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price beyond the purchase money, acquired by purchases made subsequently to the date of the contract entered into with the state. It would be injustice to the state to hold the complainant entitled to anticipated profits of this nature. In fact, he had no such profit, and can not, therefore, with strict propriety, be considered as having sustained a damage in losing what he did not possess. If this is correct reasoning, the only claim which he can sustain is, for constructing the race through which the waters of the canal were to pass, between the points of leaving and being returned to the main channel, and the value of the land dedicated to the state and destroyed. All else was a matter of private speculation, with which it seems the state \*had nothing to do. These are the only items of the report which should not be wholly rejected.

The report embraces all the expenditures made by the complainant in excavating the race, grading streets, etc., prior to his insolvency. How great a proportion was for work upon the race itself, does not appear, nor does the testimony and report furnish us with the means of determining. It must be returned to the county, with directions to the master to take further testimony, and report in accordance with these principles.

It remains to dispose of an objection to complainant's right to prosecute this petition, since his assignment to the commissioner of insolvents. In the views which we have taken of the case, the act under which we have jurisdiction in this matter confers all the right that complainant has to anything that may be decreed in his favor. At law, or in equity, he had no interest which could pass to a commissioner of insolvents. He had not so performed as to acquire such legal right, even if the state could be sued as a natural person; consequently the interest in this claim is conferred by the bill, and is a grant to him, subsequent to the assignment, based upon his moral, as contradistinguished from his legal rights.

LANE, C. J., dissenting. I can not bring my mind to concur with the views of my brethren in this case.

When the legislature committed the interests of Seely to our hands, to be determined by the principles of *justice and good faith*, I do not understand that they have given us any other rules than those which always guide the conscience of the chancellor. I cer-



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tainly can not infer that the state intended to exercise a spirit of reckless generosity at a season when it is unable to meet its honest debts.

I can not attach to this contract any terms except those which the parties have written. Seely offered to sell the state any quantity of land not exceeding ten acres, at \$500 an acre. The state accepted two acres if Seely would construct a tail-race. This is all. The state took as owner \*in fee, without obligation to [510 use it in any particular manner. That it should be so used, Seely trusted, not to the stipulations of the contract, but to the interests of the purchaser. His schemes of improvement, his plans of action, his efforts to make his land the seat of business, were motives which led him to make the offer, but matters in which the state incurred no obligation. His hopes and expectations were not created by the agents of the state, nor does anything they have done impose upon it the obligation to indemnify him for his failure or disappointment.

But, admitting the state was bound to transmit water from the canal, on Seely's land, I do not perceive how Seely has placed himself in a position to claim this duty. The race which Seely should prepare has never been completed; the means of performance which Seely should provide, have never yet been rendered possible.

Admitting the obligation, and the failure of the state to comply with it, it seems to me Seely has already received the amplest compensation for all losses he sustained from this failure, by the \$5,000 which have been already paid. But, even if he has not, the acceptance of that sum on a claim he preferred, is to be taken as a satisfaction of that claim.

But, passing over all other difficulties, and conceding the liability to make this compensation, it *belongs to his creditors*, and should be distributed to them through the commissioner of insolvents, to whom he has assigned his effects, but who is not a party to this bill.

It is with the most profound respect for the opinion of my brethren, I feel constrained, for these reasons, to record my dissent.

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State of Ohio, etc. v. Choate.

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**511] \*THE STATE OF OHIO, EX RELATIONE ABELIAH IVES, v. GEORGE W. CHOATE.**

The legislature may change the boundaries of a county, and when such change places an associate judge within the limits of another county, who does not, within a reasonable time, remove into the limits of the county for which he was appointed, he forfeits his office.

A person who attempts to exercise the office of associate judge in a county wherein he does not reside, is guilty of intrusion and usurpation.

The legislature may fill a vacancy that has happened, or that is certain to happen, before the meeting of the next general assembly.

THIS is an information, in the nature of a *quo warranto*, from Huron county.

The relator alleges, that on March 19, 1840, the defendant, late a resident of said county, but then a resident of the county of Erie, did usurp, intrude into, and unlawfully exercise, and from thence up to August 4, 1840, continued, without any right, to exercise the office of an associate judge of the court of common pleas of said county of Huron, contrary to the constitution and statutes of the state of Ohio.

The relation also sets forth, that said Choate, by the act extending the county of Erie, became a resident thereof, and that on March 14, 1840, said Ives was duly elected to said office, and on the 20th day of March was commissioned as such judge, and on the 26th day of March took the oath of office required by law, and became entitled to exercise the duties of said office.

To this information the defendant has pleaded not guilty, and has also traversed the right set up by Ives to the office.

The case is submitted on an agreed state of facts, which shows that Choate was elected and received a commission as associate  
512] judge of Huron county, on which he duly took the \*oath of office on April 28, A. D. 1838; that he then, and ever since, has resided in the town of Milan, and has exercised the office of an associate judge of Huron county; that Milan was attached, by the act of the General Assembly of March 6, A. D. 1840, to the county of Erie; that said Ives was elected on March 14, 1840, and commissioned on March 20, 1840, as associate judge of Huron county, and a certificate of his due qualification deposited with

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the clerk of the court of common pleas of said county, on March 30, 1840; that at a special term, and at the May term of the court of common pleas, in the year 1840, Ives appeared and claimed his seat; but Choate refused to give it up, and sat in court, with the concurrence of the other persons claiming to act as the judges of the court of common pleas.

JOHN WHITBECK and D. HIGGINS, for relator.

BOALT & WORCESTER, for defendant.

No arguments were furnished to the reporter.

BIRCHARD, J. The constitution of this state authorizes the general assembly to create new counties and to change or alter the boundaries of old ones. The only limit to this power is a prohibition against creating a new county of less, or the reduction of an old county to less, than an area of 400 square miles. There is nothing in the instrument whatever that further restricts this right of the general assembly, and it is not necessary to hold, nor should it be held, by any implication that does not force itself irresistibly upon the mind, that this convenient power of modifying the limits of counties is to be restricted beyond the letter of the constitution itself. It is a prerogative belonging to the sovereignty of the state, and no sovereignty can be presumed to have parted with any power essential to the public welfare, nor can \*it [513 be adjudged to have parted with it, without express and unequivocal evidence showing the fact affirmatively.

This being the law, how stands the case of the defendant? He had been elected and commissioned as an associate judge of the county of Huron, for a term limited by the constitution to a period of seven year if so long he behaved well, and if so long he resided in the county for which he was so elected.

The words of the constitution are (art. 3, sec. 3), "There shall be appointed in each county, not more than three nor less than two associate judges, who, during their continuance in office, shall reside therein."

What, then, is the effect of the commission which was granted to defendant, Choate? Did it authorize him to claim the office of judge for Huron county after his political connection with that community had ceased? Could he act as a conservator of the peace therein? The constitution is mandatory, "*he shall reside therein.*" No one could contend that a voluntary removal was

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not a forfeiture and resignation of his office. Indeed the legislature of this state have, by express enactment, declared that it shall be so held. Can it make any difference when this removal is effected by the exercise of a constitutional right of the general assembly and by an act of omission in the officer? It seems to us it can not. It is, however, alleged that this rule will enable the legislature, at any time, by a general law, to oust from office, without the form of impeachment and in violation of the spirit of the constitution, many associate judges and any president judge of this state, by changing the limits of the counties and of the circuits in which they severally reside, so as to place their residence in some other county or circuit. Arguments of this nature, which assume the possibility that a co-ordinate branch of government will wantonly violate its plain duty, ought to be held of little weight in a court of justice where the legal presumption obtains that every legal functionary will faithfully observe the obligations of duty imposed upon him by his oath of office. The general assembly, if it should ever attempt to violate a measure, 514] as the argument supposes, could not effectually \*accomplish the object. The judges would, in all cases, be able to defeat the scheme by a seasonable removal within the newly prescribed limits of his county or circuit. So, in this case, had Choate preferred to retain his office, he could have changed his residence after the passage of the act attaching Milan to the county of Erie. This he neglected to do at the time; neglected to do when the special court was called requiring his official attendance; neglected to do so at the May term of the court, and still neglected up to the 2d day of August.

We are of the opinion his right to the office of associate judge of the county of Huron was forfeited, and that he is guilty of the usurpation and intrusion with which he stands charged in the information.

Our next duty is to ascertain the rights of Abijah Ives. Section 3 of the statute (Swan's Stat. 770) requires us to pass upon his rights. He has received a regular commission as an associate judge of Huron county, and has been duly qualified, which is ample evidence of his right to claim and exercise the duties of that office, unless there is something in the case agreed showing that the general assembly transcended their powers in going into the election in the manner stated. It is contended that no elec-

tion could have been legally held at that time, inasmuch as no vacancy had then occurred, and none could have been legally anticipated. If the facts were clearly such as the position assumes there would be, doubtless, greater difficulty in the case than we now have to encounter. It is certain, from the agreed case, that at the time of the election the general assembly had no reason to expect that a vacancy would be prevented by the removal of the defendant within the newly-prescribed limits of the county. We may presume that the members of the two houses understood the tenure of office, and the condition on which it was held by the defendant, Choate. If so, they knew that without such removal by him there would be a vacancy; and, if so, it would be but an ordinary exercise of their power to provide for it.

\*Whatever may have been the practice of other states, we [515 know that, from the earliest history of Ohio, it has been the practice of the general assembly to provide for vacancies that are likely to happen during the term of office of the persons composing their own body. Three of the members of this present court have held judicial offices on appointments thus made, and, indeed, the bench of the Supreme Court has scarcely ever been filled without one or more of its members holding his commission in virtue of such an appointment, and we have yet to learn that the right has been seriously questioned. A practical construction of the power conferred by the constitution—so frequently exercised by the general assembly—so long acquiesced in, and which is coeval with the instrument itself, ought not to be questioned for slight reasons. We feel bound to consider it correctly settled that the legislature of this state has the right, at its regular session, to fill an elective office in all cases where a vacancy is to happen prior to the ensuing annual meeting of the general assembly.

From the agreed case, it appears that Ives' election was held on March 14, 1840, and that a resolution passed both houses declaring a vacancy, which bears date on the 17th day of March. There is this discrepancy in dates. It is, however, easily accounted for by persons familiar with the proceedings of legislative bodies. The election always appears to have been held on the true day. The journal, kept by the clerk, alone shows when the two houses assemble and go into an election by joint ballot. This journal can not show a date varying from the true one. Not so with a joint resolution or a law. The date affixed to them is the date of the

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signatures of the presiding officers, and, in most cases, is of necessity two or three days subsequent to the action of the two houses. We may suppose that, in this case, the resolution dated the 17th day of March, declaring a vacancy in the offices of the two associate judges of Huron county, actually passed on the morning of the day of the election and before the election was held; and we think that, as to the right of Ives, we ought so to presume, on the 516] principle that the official \*acts of legislative bodies are to be considered legal until the contrary appears. This, then, would avoid all objection to the claim of Ives. But, it may be said that this reasoning will defeat a proposition, above stated, recognizing the right of a former incumbent to retain his office, by a removal in a reasonable time, within the limits of the county, as established by the act of the 6th of March. The objection would be well founded if the joint resolution were to be held conclusive of the fact of an election to forfeit the office, as regards the rights of Choate; but we do not hold that the legislature, any more than a court, could conclude his rights without giving him a hearing. He would, undoubtedly, be allowed to controvert the resolution and overthrow the presumptions arising from it, by proving facts inconsistent therewith. In this inquiry nothing growing out of the resolution has been allowed to prejudice his claim. His rights have been passed upon wholly independent of it, and have been considered and adjudged, as we trust they would have been if such a resolution were wholly disconnected with the cause. This was all he had a right to require at our hands, for it left his own claim to be decided upon its own merits; and those merits show a forfeiture of office by him. It matters not to him how the general assembly acquired a knowledge of the intended and actual forfeiture at so early a period, nor is it material for us to inquire. Since we have ascertained the fact that such a forfeiture occurred, it does not behoove us to hold that the legislature erred in making the discovery before us, and that, therefore, the election of Ives is void.

Judgment of ouster against Choate, and judgment for Ives.

The same judgment was rendered in the case of the State, ex rel. Sears, v. Somers, upon a similar state of facts. Judge LANE dissented in both cases, and delivered the following opinion: 517] \*LANE, C. J., dissenting. The justice of the opinion of the

court, in these cases, does not rest on the ground that a vacancy is created in these offices, from the simple operation of the act of the general assembly leaving the defendants without the county of Huron, by a change of the county lines. Such a doctrine, which would subject the tenure of office of all judges in the state, whose functions are territorial, to the will of a majority in the legislature, would be too gross an abandonment of the slender judicial independence which the constitution has endeavored to secure. It is, therefore, not necessary for me to show that a case cited by the plaintiff's counsel, 21 Wend. 563, has no application. That case has no bearing upon the question of constitutional protection; it relates to a public office, created by statute, and liable to modification by the same authority, and it decides nothing, except that where the existence of a public municipal corporation is terminated by lawful authority, and two new ones are substituted in place of the old, that an officer in the old corporation is not an officer in the new one.

Neither does the opinion of the court, in the case before us, depend upon any implied resignation. The statute of 1805, Swan's Stat. 611, section 3, which provides that a judge who "removes his residence" beyond the limits within which his duties are to be exercised, "shall be considered as having resigned and vacated his office," expresses the condition which the constitution annexes to his office, and under which he accepts it, and it specifies the act which affords evidence of resignation. But it is an act *done* by him, not a mere omission; an act visible, notorious, and provable, by which third persons will not be misled, and whose effect can not be mistaken by himself.

And it is not a point of difference among the members of the court that a judge may lose his right to his office from a non-compliance with this constitutional condition of residence. It is not doubted that a judgment of ouster might justly be pronounced against a judge who fails to keep his residence within the county for which he is elected, after notice of a change of \*limits, [518 and a reasonable time and opportunity to conform to his duties.

But the present opinion of a majority of this court involves the affirmative of the following propositions: That these defendants, after the change of the boundaries of Huron county, unreasonably neglected to take their residence within it; that, in consequence of their neglect, and without judicial proceedings, their offices be-

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came vacant, so that the election of the relators, on the 14th day of March, was valid. It is to these propositions I am unable to lead my mind to assent.

It appears to me a sufficient objection that no such case is made by the pleadings. The prosecuting attorney avers the defendant unlawfully exercised his office from the 19th day of March to the filing the information. Had he stopped there, the defendant must have shown his authority. The State v. Commercial Bank et al., 10 Ohio, 541. But he proceeds to disclose the specific ground of forfeiture, viz: "That by the extending the limits of the county of Erie, the defendants became the residents of Erie county, and are non-residents of Huron county, by reason whereof the aforesaid office of associate judge became vacant."

No notice of the law, no neglect to remove, no opportunity to comply, is shown; but the forfeiture is claimed in pleading to have become absolute by the bare extension of limits. It is to this cause of forfeiture that the defendants have plead; and it is to this case of forfeiture which the counsel, on both sides, have argued, and it seems gratuitous to decide a case which neither counsel have contemplated, and which lies not within the record.

But, passing over this question of pleading, I can not see how these offices could have become vacant on March 14, 1840. The vacancy must have existed on that day, because the election of the relators could not be holden valid unless a vacancy existed then, for an election to fill an office not vacant is void. 1 Kent's Com. 224; The State v. Constable, 7 Ohio, 1; 2 Bac. Abr. 20; 2 Term, 280; Ang. & Ames on Corp. 65, The only known exception is \*the usage of our legislature to provide for the termination of an office, which must, of necessity, happen before its next session, by limitation of time, and, for obvious reasons, has never been held to extend to a contingent vacancy.

Now a lawful public officer, whose doings affect third persons, who holds a commission under the broad seal, is not to lose his title by a bare private, perhaps secret, act of omission. The tenure of such an office has never before been held determined, without the intervention of some proceeding of an analogous public nature, as a judgment in *quo warranto*, or, in some cases, by a writ of superseas, or discharge. Dyer, 155, 198, 211; 9 Co. 98; Co. Lit. 233; Cro. Car. 60, 61; 1 Sid. 81, 134; 3 Co. 44; 1 Roll. Abr. 580; 3 Mod. 335; 3 Lev. 288; The State v. Bryce, 7 Ohio, 82. His sit-



uation is similar to the holder of a franchise. In both cases, although the forfeiture is incurred, no right is lost, until declared by some judicial or other public proceeding; *Rex v. Corporation of Carmarthen*, 2 Burr. 869; *Commonwealth v. Union Insurance Company*, 5 Mass. 230; *Torrett et al. v. Taylor*, 9 Cranch 51; *Trustees v. Hills*, 6 Cow. 23; *Slee v. Bloom*, 5 Johns. Ch. 366; 16 Serg. & Rawle, 140; *State Bank v. Indiana*, 1 Blackf. 267; and in both cases the reason is the same—to give the officer a day in court, to answer for his neglect, and to afford evidence to him, and to all the world, where the right is. I regard this rule as affording the most abundant reason for holding the election of the relators, or the 14th of March, void, for want of a vacancy.

Viewing the case, however, upon its broadest merits, what is the act by which the defendants incurred a forfeiture as early as the day on which their places were supplied by the relators. An office is one of the kinds of incorporeal property, an estate in the lawful owner, the possession and tenure of which are governed by rules as definite and as well settled as those which regulate the ownership of other kind of property. Its lawful owner is not to lose it except by lapse of time, or by his own express consent, or from some fault, negligence, or misconduct. Now what have these defendants done \*which they ought not; or, what have they [520 not done which they ought? Choate lives on a tri-weekly post route, 114 miles distant from Columbus; Somers at a distance of 130 miles, near a post-office, at which the mail is received once or twice each week. The law altering the county limits was passed on March 6, 1840; the election of the relators occurred on the 14th day of March. The interval of time between these events, excluding the day of passing the law, the day of election, and the intervening Sunday, is six days. It was the duty of the defendants, as soon as the passage of the law was made known to them, to have made their choice whether they would remove their residence, and to complete such change within a reasonable time; but no forfeiture would accrue except from such neglect to remove, and the legislature would have no pretense to regard the office vacant until such neglect was made known to them. It may not be easy to define what precise time the law would adjudge reasonable. The case most analogous, is the law requiring clerks of new counties to keep their offices at the seats of justice within six months after they are established. It should be at least such a

length of time as would permit the master of a household conveniently to make the change ; and he must be a very strict constructionist who would exact the speed with which a man would fly from his enemy. The very statement of the case, therefore, involves knowledge of the passage of the law, the opportunity of choice, convenient time to change one's residence, and information communicated to the legislature, that such removal had been neglected. Is this interval of six days, such reasonable time, within which all these things may be presumed to have occurred? Why, there was not sufficient time to send from Columbus to take a deposition. There was only time enough to send a letter to Choate and secure his answer by mail. There was not time to communicate, by the ordinary course of mail, with Somers. There was barely time for a man to ride to them from Columbus, and return, on a good horse, with good weather and good roads. I can not persuade myself, therefore, that these cases call for so *swift* a judgment.

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## ACCOUNT BOOK—

When, on a trial for perjury, it became material to prove the contents of a book of accounts, which the accused had admitted to be correct and true, it was proper for the book to go to the jury, as the best evidence of the extent and nature of the admission. *Halleck v. The State*, 400.

## ACKNOWLEDGMENT OF DEEDS—

Where a deed for land in Trumbull county, Ohio, was made in Connecticut, and *there* acknowledged before Camden Cleveland, "one of the justices of the court of common pleas of the county of Trumbull, in the Northwestern territory," such acknowledgment is sufficient. *Kinsman v. Loomis and Wood*, 475.

## ACTION—

1. The value of goods sold by a commission merchant, contrary to the instructions of his principal, may be recovered in assumpsit, for goods sold and delivered. *Woodward v. Suydam and Blydenburg*, 360.
2. Trover will lie to recover the landlord's share of a crop seized, and sold on execution against the cropper. *Case v. Hart and Humphrey*, 364.
3. Assumpsit against the county commissioners may be maintained by the clerk of the court, for the price paid by him for a press, which they were bound to furnish. *Comm'rs of Trumbull County v. Hutchins*, 372.

## ACTS OF THE GENERAL ASSEMBLY—

See STATUTE; LEGISLATION. .

## AGENT—

See PRINCIPAL AND AGENT.

## AGREEMENT—

See CONTRACT.

## APPEAL—

1. There can be no appeal to the Supreme Court from a judgment of the court of common pleas, on a petition, under the statute for partition. *Hoy v. Hites*, 254.
2. A defective appeal bond, if it contain the substance of a bond, will sustain an appeal so far as to justify an order to file a new bond. *Saterlee v. Stevens*, 420.

(445)

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 Apportionment—Assumpsit.
 

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## APPORTIONMENT—

1. There can be no apportionment amongst joint wrong-doers. *Talmadge v. The Zanesville and Maysville Road Company*, 192.
2. Where a stage passenger has recovered damages from the coach owners, for an injury sustained in the upsetting of a coach, they can not recover over against the road company, on account of the road being out of repair, which may have contributed to the accident. *Ib.* 192.
3. Apportionment amongst purchasers of lands subject to judgment liens—*The Commercial Bank v. Western Reserve Bank*, 442.

## APPRAISEMENT—

See MORTGAGE, 8.

## ASSIGNMENT—

1. The act of February 23, 1835, relating to fraudulent assignments in trust, does not apply to an absolute transfer of property. *Wilcox and Welch v. Kellogg et al.* 394.
2. Notes given by one member of a firm to his partners, on its dissolution, become their individual property, and in the possession of their assignee can not be subjected to the payment of the creditors of the firm. *Belknap v. Cram and others*, 411.
3. Where a patent for land recites assignments by persons competent to convey, there is no presumptive notice of latent defects to one who derives title under such patent. *Bell and wife v. Duncan et al.* 192.
4. It is otherwise, where the patent recites assignments by persons not competent to convey title. *Ib.*

## ASSOCIATE JUDGE—

1. Under the act of February 14, 1840, the same individual may hold, at the same time, the offices of associate judge and county treasurer. *The State v. McCollister*, 46.
2. Associate judges are limited in their jurisdiction only by the county lines. *Le Grange v. Ward et al.* 260.
3. Whether they may take probate of a will at any place within the county, other than the county seat, *quære*. *Ib.*
4. The acknowledgment of a deed for land in Ohio, before an associate judge of the common pleas, taken in the State of Connecticut, is sufficient. *Kinsman v. Loomis and Wood*, 475.
5. The legislature may change the boundaries of a county; and when such change places an associate judge within the limits of another county, who does not, within a reasonable time, remove into the limits of the county for which he was appointed, he forfeits his office. *Ohio v. Choate*, 511.
6. A person who attempts to exercise the office of an associate judge in a county wherein he does not reside, is guilty of intrusion and usurpation. *Ib.*

## ASSUMPSIT—

An action of assumpsit may be maintained on a subscription for the construction of a road, and the subscription paper may be given in evidence, under the common count, for work and labor. *Sperry v. Johnson*, 452.

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**Attorney—Bail.**

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**ATTORNEY—**

1. The creditor in an execution may claim the benefit of a purchase made by his attorney, especially if the whole debt is not paid. *Wade v. Pettibone*, 57.
2. But he must assert his right in a reasonable time. *Ib.*
3. As between the creditor's attorney and the judgment debtor, or, as between him and third persons, a purchase, by the attorney, at sale upon execution, is without objection, but it is otherwise, as between him and his client. *Ib.*
4. Although such purchase be made by the attorney in entire good faith, his clients may step in and claim the benefit of it unless made with their assent. *Ib.*
5. But they may lose this right by unreasonable delay or neglect. *Ib.*
6. A stipulation, in a warrant of attorney, to pay collection fees, in addition to the principal debt and interest, is against public policy, and void. *Shelton et al. v. Gill et al.* 417.
7. The court of common pleas, and the Supreme Court, have power to suspend an attorney from practicing in their courts, for official delinquency, or base immorality. *Ohio v. Chapman*, 430.
8. Conviction of crime would be good cause for suspension. *Ib.*
9. A record in an action of slander, by an attorney, showing that a plea of justification, charging him with commission of a crime, was found to be true, is not equivalent to a conviction for that offense. *Ib.*
10. In proceedings against an attorney, the evidence must be confined to, and establish the specification. *Ib.*

**AUCTION—**

See **VENDORS AND PURCHASERS**, 1, 2.

**AUCTIONEER—**

In sales at auction, the auctioneer is the agent of both parties; and a memorandum of sale, signed by him, will take the case out of the statute of frauds. *Pugh and Shultz v. Chesseldine*, 109.

See **VENDORS AND PURCHASERS**.

**AUDITOR OF COUNTY—**

The county auditor's final certificate to a purchaser of school lands can not be used as evidence to charge the county treasurer, nor can certified copies of accounts made out by the auditor of state, from such certificates, be received as competent evidence. *The State v. Wells, Adm'r*, etc. 261.

**AUDITOR OF STATE—**

Certified copies of files of the auditor of state are evidence only where the originals would be competent. *The State v. Wells, Adm'r*, etc., 261.

**BAIL—**

The act of March 19, 1838, abolishing imprisonment for debt, operates to discharge a recognizance of bail, entered into before the act took effect. *Tousey v. Avery*, 90.

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Banks and Banking—Bills of Exchange and Promissory Notes.

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**BANKS AND BANKING—**

1. The right to exercise banking powers is not a natural right belonging to corporations. *The State v. The Granville Alexandrian Society*, 12.
2. The act restraining banking, passed February 8, 1815, 2 Chase's Stat. 868, restricted all banking powers not expressly granted. *Ib.* 15.
3. Under the act of January, 1815, "to prohibit the issuing and circulating of unauthorized bank paper," it is sufficient to charge in the indictment, in general terms, that the defendant acted as an officer of a bank, not incorporated by law. *Lougee v. The State*, 68; *Bonsal v. The State*, 72.
4. Individual notes, intended to pass as currency or money, are not competent evidence against the person issuing them, on an indictment for acting as an officer of a bank, without proving that there was a company, or association of individuals, formed for the purpose of putting in circulation such notes. *Steedman v. The State*, 83.
5. When the profits of a bank are applied in payment of stock, the profits so applied are subject to the tax imposed by the act of March 12, 1831, on dividends. *The State v. The Farmers' Bank of Canton*, 94.
6. The Washington Social Library Company has no authority, either by charter or prescription, to exercise the franchise of banking. *The State v. The Washington Social Library Company*, 96.
7. A plea that the defendants have, for twenty years, exercised the franchise of banking, which they are accused of usurping, is valid under the statute. *The State v. The Miami Exporting Company*, 126.
8. In a suit, under the act of 1839, against an officer of a bank, for refusing to indorse its bills on presentment, it is necessary to aver, in the declaration, a general suspension, by the bank, of specie payments. *Rockwell v. The State*, 130. Debt is the proper remedy for the penalties imposed by this act. *Ib.*
9. On an indictment, laying a particular day when the accused acted as an officer of an unauthorized bank, it is competent for the prosecution to prove the act, after the day laid. *Brown v. The State*, 276.
10. When such association exists in this state, it is not necessary for the prosecution to prove that the bank or association is not incorporated; its incorporation will be presumed. *Ib.*
11. The Commercial Bank of Cincinnati has no right under its charter, to take "upon banking principles and usages," more interest than six per cent. per annum in advance, upon its loans and discounts. *John Creed v. The Commercial Bank of Cincinnati*, 489.
12. If more be taken, the note or bill on which it is taken, is void. *Ib.*

**BANK BILLS—**

Bartering and selling counterfeit bank-bills. *Vanvalkenburg v. The State*, 404.

**BILLS OF EXCHANGE AND PROMISSORY NOTES—**

1. The assignee of a note, not negotiable, may sue the maker, in chancery, to enforce payment. The assignment of a note, not negotiable, does

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 Bills of Exchange and Promissory Notes.
 

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**BILLS OF EXCHANGE AND PROMISSORY NOTES—Continued.**

- not transfer the legal, but only the equitable interest. *Townsend v. P. & G. Carpenter*, 21.
2. At law, the suit must be in the name of the assignor; and it is not even necessary to notice the name of the assignee on the record, as that it is for his use. *Ib.*
  3. The indorsers of an accommodation bill are not joint sureties, but are liable to each other, in the order of their becoming parties. *Williams v. Bosson & Bros.*, 62.
  4. The holder of a bill is entitled to maintain suit upon it, unless some circumstances exist to render his title suspicious. *Ib.*
  5. The right of the indorsee to hold all earlier parties responsible, is undoubted. *Ib.*
  6. The indorsement of a note, not negotiable, is not an original undertaking between the indorser and indorsee; but it is collateral, and payment must be demanded, and notice given to the indorser, as upon negotiable paper. *Parker v. Riddle*, 102.
  7. The indorsement of such a note, by a person not a party to it, is a guaranty. *Ib.*
  8. Upon such guaranty, demand of payment must be made, when the note becomes due, and notice given to the indorser before suit. *Ib.*
  9. Where statutory damages are claimed upon a protested bill, it is for the jury to find those damages, and not for the court to assess them and add them to the verdict. *Crawford v. Wolcott*, 145.
  10. Where a negotiable note has, before it fell due, been transferred, in consideration of a pre-existing debt, the maker can not, as against the person receiving it, without notice, take advantage of any equities between himself and the payee. *Carlisle v. Wishart*, 172.
  11. A pre-existing debt is a good consideration for the transfer of a negotiable note, and a *bona fide* indorsee, without notice, takes the note discharged of prior equities. *Ib.*
  12. The rule, in simple contracts appears to be settled, that, to give a note or other security of no higher nature for a prior engagement, is no discharge of the original agreement, unless the latter be paid or performed, or, unless it was the understanding of the parties that the latter should extinguish the former. *McNaughten v. Partridge et al.* 232.
  13. But when a bond or sealed instrument is taken for a simple contract debt, the simple contract is merged, lost, and discharged, by the bond. *Ib.*
  14. The presumption is, that such was intended by the parties, where a security of a higher nature is received. *Ib.*
  15. And that, whether it be the bond of the debtor, or of a third person. *Ib.*
  16. In a suit against principal and surety, a plea by the surety, that the time was extended without his consent, is bad, not being an answer to the whole action. *Slipher v. Fisher et al.* 199.
  17. Notes, given by one member of a firm to his partners, on its dissolution become their individual property, and, in the hands of their assignee,

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Blacks, Negroes, and Mulattoes—Book of Drafts.

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**BILLS OF EXCHANGE AND PROMISSORY NOTES—Continued.**

- can not be subjected to the payment of the debts of the firm. *Belknap v. Abbott & Cram*, 411.
18. Money paid on notes given for a void patent right, may be recovered back, and the collection of outstanding notes, in the hands of the vendors of such void patents, will be enjoined. *Darst v. Brockway et al.* 462.
  19. A note or bill discounted by a bank, on which a greater rate of interest has been taken than six per cent. per annum, in advance, is void. *Creed v. The Commercial Bank of Cincinnati*, 489.
  20. Where a bill of exchange, intended to be addressed to the defendant in Philadelphia, is, by mistake, addressed to him in Ohio, and six per cent. damages, on its being protested, have been paid, they can not be recovered back. *The Commercial Bank v. John Reed*, 498.
  21. Nor will such payment be evidence that the bank, by which the bill was discounted, has taken a greater rate of interest than was allowed by its charter. *Ib.*

**BLACKS, NEGROES, AND MULATTOES—**

1. All nearer white than black, or of the grade between the mulattoes and the whites, are entitled to enjoy every political and social privilege. *Jeffries v. Ankeny and others*, 375.
2. Where the court of common pleas instructed the jury that a man, who has any negro blood whatever, was not a lawful voter, it is error. *Thacker v. Hawk*, 376.

**BOATS—**

1. The act providing for the collection of claims against steamboats and other water-craft, authorizing proceedings against them by name, extends the right of recovery to provisions, and all other necessities furnished for the use of the boat. *Canal-boat Huron v. Simmons*, 458.
2. The statute substitutes the boat for the owner, and authorizes suit against it, by name, for all money demands against the owner, arising from debts contracted on account of, or for the use of the boat, or for injuries resulting to passengers or property by the boat, or from misconduct of the officers and crew. *Ib.*

**BOND—**

1. A sheriff's return, that he could find no goods or chattels, lands or tenements of the principal debtor, unincumbered by mortgage, is sufficient to authorize suit upon an injunction bond. *Seymour v. King*, 342.
2. Such return affords ample ground to commence the suit; under such circumstances the surety may protect himself by paying the debt and claiming the benefit of the judgment by way of substitution. *Ib.*
3. A defective appeal bond, if it contains the substance of a bond, will sustain an appeal, so far as to justify an order to file a new bond. *Saterlee et al. v. Stevens*, 420.

**BOOK OF DRAFTS—**

The book of drafts of the Connecticut Land Company is not evidence of a legal title, but is evidence of an equity against the trustees of that company. *Kinsman v. Loomis*, 475.



## Boundary—Chancery.

**BOUNDARY—**

1. Land on the Ohio river, between high and low-water mark, is not common to the public, but may be conveyed by the adjacent proprietor, whose land bounds on the river. *Blanchard's Lessee v. Collins and others*, 138.
2. Where a deed calls for an object on the bank of a stream, thence south, thence east, thence north, with the bank of the stream, and with the course of the bank to the place of beginning, the stream, at low-water mark, is the boundary. *Lamb v. Ricketts*, 311.
3. Where the owner of land is bounded by a stream, he owns to the center of the stream, subject to the easement of navigation; but, to calculate the quantity of land in a survey, no reference is had to what lies between low-water mark and the center of the stream. *Ib.*
4. The legislature may change the boundaries of a county; and, when such change places an associate judge within the limits of another county, who does not, within a reasonable time, remove into the limits of the County for which he was appointed, he forfeits his office. *Ohio v. Choate*, 511.

**CASES EXPLAINED, AFFIRMED, DOUBTED, OVERRULED—**

1. *The Granville Alexandrian Society v. John Van Buskirk*. Banking privileges. Doubted. *Ohio v. The Granville Alexandrian Society*, 13.
2. *Douglas v. Waddle*, 10 Ohio, 413. Accommodation indorsers. Overruled. *Williams v. Bosson & Bros.* 67.
3. *Lodwick v. Kennedy*, 7 Ohio, 433. Insurance. Overruled. *Perrin's Adm'r v. Protection Insurance Company*, 170.
4. *Fulton and Foster v. Lancaster Insurance Company*, 7 Ohio, 5. Insurance. Overruled. *Ib.*
5. *Biley and Van Amringe v. Johnson*, 8 Ohio. Bills of exchange. Consideration. Overruled. *Carlisle v. Wishart*, 172.
6. *Brush's Adm'r's v. Ware*, 1 McLean. 535. Patents. Recitals. *Bell and wife v. Duncan et al.* 194.
7. *Reeder et al. v. Barr et al.*, 4 Ohio, 496. Patents. Recitals. *Ib.*
8. *Bank of Steubenville v. Leavitt et al.*, 5 Ohio, 207. *Bank of Steubenville v. Hoge et al.* 6 Ohio, 18. Principal and surety. Explained. *Slipher v. Fisher et al.* 301.
9. *The Lessees of McCulloch v. Aten*, 2 Ohio, 307. *Gavit v. Chambers* 3 Ohio, 495. *Benner's Lessee v. Platter et al.* 6 Ohio, 504. Boundary. Watercourse. *Lamb v. Ricketts*, 315.
10. *Dixon and Hawke v. Ewing's Adm'r's*, 3 Ohio, 280. Principal and surety. Affirmed. *Bank of Lake Erie v. Western Reserve Bank*, 444.
11. *Moore's Lessee v. Vance*, 1 Ohio, 1. Acknowledgment of deed. Affirmed. *Kinsman v. Loomis and Ward*, 475.
12. *Bank of Chillicothe v. Swayne and others*, 8 Ohio, 257. Banks. Interest. Affirmed. *Creed v. Commercial Bank of Cincinnati*, 489.

**CHANCERY—**

1. The assignee of a note not negotiable may sue the maker in chancery, to enforce payment. *Townsend v. P. & G. Carpenter*, 21.

## Chancery.

CHANCERY—*Continued.*

2. The chancellor often refuses to aid in the execution of contracts which he would not rescind. *Watkins v. Collins et al.* 31.
3. Inadequacy of price may be so gross as to carry evidence of fraud. *Ib.* 35.
4. Equity has no jurisdiction to compel a sheriff to pay over money collected on an execution. *Douglass v. Wallace*, 42.
5. In the sale of real estate at auction, a mistake by the auctioneer, in entering the name of the owner of the real estate in the memorandum of sale, will be corrected in equity. *Pugh and Shultz v. Chesseldine*, 109.
6. If the purchaser has treated the contract as valid, although he might have abandoned it, he will be required to perform it. *Ib.*
7. Where a patent for land recites assignments, by persons competent to convey, there is no presumptive notice of latent defects to one who derives title under such patent. *Bell and wife v. Duncan et al.* 192.
8. The defense of *bona fide* purchaser is available to one deriving title under such patent. *Ib.*
9. It is otherwise, if the patent recites assignments by persons not competent to convey. *Ib.*
10. Where a bond is executed by one member of a firm, all the members intending the instrument should bind them, the obligee has no remedy against the firm at law, but on the ground of mistake may charge them in equity. *McNaughten v. Partridge et al.* 223.
11. If the obligee, after discovery of the mistake, pursues the individual maker of the bond, it is a ratification of the instrument, and relief against the copartners will not be afforded in equity. *Ib.*
12. A mistake in law may be corrected in equity. *Semble.* *Ib.*
13. A general demand against a judgment debtor, to disclose his assets, that they may be subject to execution, is proper. *Miers and Caulson v. The Zanesville and Maysville Turnpike Company*, 273.
14. No suit lies against the state to compel payment of subscription to stock. *Ib.*
15. Where there is a receiver of tolls appointed under the statute, by a court of competent jurisdiction, it acquires authority to determine all questions touching the distribution and appropriation. *Ib.*
16. A judgment debtor may pursue different interests, and against different persons, in the same bill. *Cadwallader v. The Granville Alexandrian Society et al.* 292.
17. And may demand, in general terms, from his debtor a disclosure of his assets. *Ib.*
18. Where forfeiture or a penalty may ensue from the answer to a bill, the defendant is not bound to answer. *Ib.*
19. Where a bill is framed in the alternative, charging that property is held under an illegal and void agreement, and praying that it may be set aside, or, if held valid, that the debtor's residuary interest may be subjected to payment of the debt, the defendant may be protected in with,

## Chancery.

**CHANCERY—Continued.**

- holding a disclosure, as to a part, while he would be bound to answer the remainder. *Ib.*
20. To create a case of election, there must be a plurality of gifts or rights, with an intention, express or implied, of the party who has the right to control one or both, that one should be a substitute for the other. *Melick and wife v. Darling*, 243.
  21. The party who is to take has a choice, but he can not enjoy the benefits of both. *Ib.*
  22. Where a person without title conveys by deed of warranty, and afterward receives title, as trustee from the rightful owner, for the purpose of transmitting it to a *bona fide* purchaser from the rightful owner, the doctrine of estoppel does not apply. *Burchard v. Hubbard et al.* 316.
  23. The legal title of a trustee, under a deed of trust, with power to sell for the payment of debts, is not divested by discharge of the debts, but the trustee may maintain ejectment. *Moore v. Burnet*, 334.
  24. In an ordinary deed of trust a reconveyance from trustee to *cestui que trust* is necessary, to reinvest him with the legal title. *Ib.* 341.
  25. But a mortgage is a mere incident to the debt which it is intended to secure. It lives and dies with the debt; satisfaction destroys it. *Ib.*
  26. Where, prior to a judgment, a permanent leasehold estate had been conveyed by deed, absolute upon its face, although intended only as security, there remained only an equitable interest in the judgment debtor, to which no judgment lien attached. *Loring v. Melingy and others*, 355.
  27. And the creditor who first pursued the equity by bill, is entitled to be first satisfied. *Ib.*
  28. The partition of lands incumbered by a dower estate, may be enforced in equity by the owner of the incumbrance, he being also tenant in common of the remainder. *Morgan v. Staley*, 389.
  29. A transfer by a firm, to one partner, *bona fide*, and by him to a third person, in like manner, for valuable consideration, passes both the legal and the equitable title to the property against the creditors of the firm. *Wilcox and Welch v. Kellogg and others*, 394.
  30. The equity of creditors upon partnership property, for debts due them, is only the equity of the partners in the property, and can only be reached through the partners. *Ib.*
  31. An absolute transfer of property, without fraud, does not come within the provisions of the act of February 23, 1835, relating to fraudulent assignments. *Ib.*
  32. Joint property will, in equity, be subjected to the payment of partnership debts. *Belknap v. Abbott & Cram*, 411.
  33. Notes, given by one member of a firm to his partners, on its dissolution, become their individual property, and, in the possession of their assignees, can not be subjected to the payment of the debts of the firm. *Ib.*

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 Chancery.
 

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CHANCERY—*Continued.*

34. To enjoin a judgment at law, on the ground of illegal interest, the bill must show a tender of the amount equitably due. *Shelton v. Gill et al.* 417.
35. An objection to the examination of a defendant in chancery as a witness, without a special order for that purpose, comes too late at the final hearing, and after cross-examination. *Woods v. Dille et al.* 455.
36. Where a parol contract, for the purchase or sale of lands, is admitted by a defendant in his answer, without relying upon the statute of frauds as a defense, performance will be decreed. *Ib.*
37. Possession, obtained under a contract of purchase, does not become adverse to the vendor, while the contract is acted upon, and payment made. *Ib.*
38. What protection will be afforded to a *bona fide* purchaser, without notice, is a question which does not arise, where neither party has the legal title. *Ib.*
39. As between equities, the elder will prevail. *Ib.*
40. Relief will be afforded, in a court of equity, against the payment of notes given for a void patent right. *Darst v. Brockway et al.* 462.
41. Money paid on such notes may, on the ground of failure of consideration, be recovered back, and the collection of such outstanding notes, in the hands of the vendors, will be enjoined. *Ib.*
42. Where an instrument, by mistake of the parties as to the legal effect of the terms used, fails to carry out their intention, relief may be afforded in equity. *Evants v. Strobe's Adm'r*, 480.
43. A mistake of law will be corrected in equity. *Ib.*
44. Where a court of equity have all the parties before them, and can settle and adjust all their rights, so as to avoid subsequent litigation, it will do so, although relief might be had at law. *Ib.*
45. As where, after eviction, a bill was filed to correct a mistake, in a deed which contained a defective warranty, the court having obtained jurisdiction to correct the mistake, and having the proper parties before them, will not drive the complainant to his action at law upon the corrected deed, but will decree compensation. *Ib.*
46. A special act, authorizing *Morris Seely* to file a bill as in chancery, against the state, and requiring the cause to be decided upon "*principles of justice and good faith*," must be construed as intending to relieve the complainant from all technical objections that might arise in a proceeding, according to the known usages of law and chancery, and as conferring upon the court power to examine the claim, in the same spirit of liberality that might be proper for the legislature to exercise. *Seely v. The State*, 501.
47. In such case, the objection that the complainant has not, by performance of his own part of the contract, placed himself in a condition to claim damages of the state for her non-performance, will not be sustained, although the objection might have prevailed in an ordinary chancery proceeding. *Ib.*

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Charter—Common Carriers.

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**CHARTER—**

See CORPORATIONS.

**CINCINNATI—**

Amended charter is not legally accepted. *Foots v. Cincinnati*, 409.

**CLERK OF THE COURT—**

A general and standing order of the court of common pleas, directing the clerk to issue execution for his own benefit, and at the instance of any person entitled to costs, will authorize the clerk, without any special order, to issue such execution. *Elliott v. Ellery*, 306.

**COLORED PERSONS—**

1. All nearer white than black, or of the grade between the mulattoes and the whites, are entitled to enjoy every political and social privilege of the white citizen. *Jeffries v. Ankeny and others*, 375.
2. A person, the offspring of a white and half-breed Indian, is a lawful voter. *Ib.*
3. Where the court instructed the jury that a man who has in him any negro blood whatever, is not a lawful voter, it is error. *Thacker v. Hawk*, 376.

**COMMERCIAL LAW—**

1. The principles of commercial law ought to be uniform. *Perrin's Adm'r's v. Protection Insurance Company*, 171.
2. It is of much interest to the mercantile world to preserve uniformity in the great principles of commercial law. *Carlisle v. Wishart*, 192.

**COMMISSIONERS—**

See COUNTY, 2, 3.

**COMMISSION MERCHANT—**

1. Where a commission merchant, from time to time, sends an account of sales to his principal, who makes no objection to the sales, and draws for the balance of the account rendered, it is a ratification of the sales, and the principal can not recover for any alleged violation of his instructions. *Woodward v. Suydam and Blydenburg*, 360.
2. The value of goods sold by a commission merchant contrary to the instructions of his principal, may be recovered, under the common counts, for goods sold and delivered. *Ib.*
3. The real value, at the time of sale, is the rule of damages. *Ib.* 363.

**COMMON CARRIERS—**

1. Where a recovery has been had against coach owners, for negligence in upsetting the coach and injuring a passenger, such damages can not be recovered by the coach owners, over against the road company, on the ground that the road was out of repair, and thus contributed to the accident. *Talmadge v. The Zanesville and Maysville Road Company*, 197.
2. The damage done to the property of the coach owners may be recovered. *Ib.*

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 Compensation—Constitutional Law.
 

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**COMMON CARRIERS—Continued.**

3. A carrier receiving goods in the ordinary course of business, and in the proper line of transit, has a lien for the freight and charges paid, although the goods may have suffered damage before they reached him, while in the hands of some preceding carrier. *Bowman v. Hil-ton*, 303.

**COMPENSATION—**

Unless a law authorizing private property to be taken for the public use, provides compensation to the owner, it is void. *Foote v. Cincinnati*, 410

**CONFIRMATION—**

See TAX TITLE; VENDORS AND PURCHASERS, 8.

**CONNECTICUT LAND COMPANY—**

*Kinsman v. Loomis and Wood*, 475.

**CONSIDERATION—**

1. Inadequacy of consideration may be so gross as to carry evidence of fraud. *Watkins v. Collins et al.* 35.
2. A pre-existing debt is a good consideration for the transfer of a negotiable note; and a *bona fide* indorsee, without notice, takes the note, discharged of prior equities. *Carlisle v. Wishart*, 172.
3. Money paid on assignments of void patent rights, may be recovered back, on the ground of failure of consideration. *Darst v. Brockway and others*, 462.
4. Where money was paid under a supposed legal obligation, when in truth no legal liability existed, it can not be recovered back if there was a moral obligation to make the payment; such moral obligation will be a sufficient consideration to support the payment. *Commercial Bank v. John Reed*, 501.

**CONSTITUTIONAL LAW—**

1. By the proper construction of the term, "*free white citizens*," as used in the constitution, all nearer white than black, or of the grade between the mulatto and the white, are entitled to enjoy every political and social privilege of the white citizen. *Jeffries v. Ankeny and others*, 375.
2. Where the court of common pleas instructed the jury that a man who has any negro blood whatever, is not a legal voter, it is error. *Thacker v. Hawk*, 376.
3. Under the sixth section of the eighth article of the constitution, in criminal cases, the jury are not absolute judges of the law, but only under the direction of the court, as in other cases. *Montgomery v. The State*, 424.
4. A law authorizing private property to be appropriated for public use, without providing compensation to the owner, is void. *Foote v. Cincinnati*, 403.
5. Associate judge—term of office. *Ohio v. Choate*, 511.
6. Erection of new counties. *Ib.*

## Construction—Corporations.

## CONSTRUCTION—

1. *Of Statutes.* See STATUTES; CORPORATIONS.
2. *Of Deeds.* See DEEDS.
3. *Of Contracts.* See CONTRACTS; WORK AND LABOR.

## CONTRACT—

1. A parol contract, for a lease between landlord and tenant in possession, under a prior lease, is within the statute of frauds, unless possession be held solely under and in performance of the parol contract, the terms of holding clearly indicating the possession to be under the subsequent parol lease. *Armstrong v. Kattenhorn*, 285.
2. Where a parol contract, for the purchase or sale of lands, is admitted by a defendant in his answer, without relying upon the statute of frauds for a defense, performance will be decreed. *Woods v. Dille et al.* 455.
3. On a contract with the state, anticipated profits and speculations in real estate can not be claimed as damages. *Seely v. The State*, 501.
4. Where an administrator undertakes to execute a real contract, and, by mistake, the terms employed fail to carry out the intention of the parties, equity will afford relief against the mistake. *Evants v. Strode's Adm'r*, 480.
5. As where the deed executed was intended; but does not operate to warrant the title. *Ib.*
6. And where, after eviction, the court have acquired jurisdiction to correct the mistake, and have proper parties before them, they will decree compensation. *Ib.*

## CONTRIBUTION—

See APPORTIONMENT.

## CORPORATIONS—

1. A grant of power in an act of incorporation, "to hold any estate, real or personal, and the same to sell, grant, or dispose of, or bind by mortgage, or in such other manner as they shall deem most proper for the best interest of the corporation," does not confer upon such corporation banking privileges. *State of Ohio v. Granville Alexandrian Society*, 1.
2. Under the clause in an act of incorporation, that the action of the corporation shall be "subject to such rules and regulations as the legislature, from time to time, may think proper to make," the general assembly may restrict such corporation from exercising the franchise of banking. *Ib.*
3. In proceedings against corporations, by *quo warranto*, the information need not aver the institution proceeded against to be a body corporate in law. *Ib.* 9.
4. Although such averment would seem more consistent with good pleading. *Ib.*
5. Upon such proceedings, it should be averred that the violation of the law complained of took place in the county where the information was filed. *Ib.*
6. The title to an act of incorporation does not constitute any part of the

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Costs—County.

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**CORPORATIONS—Continued.**

- act; but it may be referred to, in order to explain what is doubtful in the act itself. *Ib.* 10.
7. Individuals have natural rights; corporations have not. *Ib.* 12.
  8. The rule for construing acts of incorporation. *Ib.*
  9. The legislature, having granted powers to a private corporation, can not, consistently with the constitution, take away those powers, without any default on the part of the incorporation. *Ib.* 15.
  10. And even where a corporation has violated its charter, it is rather a judicial than a legislative question whether such violation is a cause of forfeiture. *Ib.*
  11. The legislature may—and in most, if not in all cases, it is well that they should, in the acts of incorporation which they pass—retain the power of modifying, changing, and altering, as occasion may require. *Ib.* 16.
  12. Corporations can exercise only such powers as are expressly granted. *The State v. Washington Society Library Company*, 97.
  13. A corporation, created for any lawful purpose, is invested with such powers as are directly conferred, and with such as are necessary to execute its lawful functions, and no more. *Kemper v. Turnpike Company*, 393.
  14. Beyond this, the grant is to be taken strictly. *Ib.*
  15. An incorporated company, authorized to lay out and construct a road, erect gates, and collect toll, has no right to appropriate, for a toll-house, land lying without the line of the road. *Ib.*
  16. Where a city charter authorized the appropriation of private property, without providing for any compensation to the owner, it was held that he may recover, in an action at law against the corporation, the damages sustained. *Foots v. Cincinnati*, 408.
  17. Unless the law, by which private property is taken for public use, provides compensation, it is void. *Ib.*

**COSTS—**

1. In ejectment, where defendant claims the benefit of the occupying claimant law, and judgment is given in his favor, the court will order the lessee of the plaintiff to pay costs. *Patterson's Lessee v. Prather*, 36.
2. A general and standing order of the Court of Common Pleas, directing the clerk to issue execution for costs, will authorize him, without any special order, to issue such execution. *Elliott v. Ellery*, 306.
3. Costs will not be decreed against a minor seeking her estate. *Brush v. Brush*, 292.

**COUNTY—**

1. The organization of a new county does not remove the lien of a judgment or mortgage from land lying within the newly organized limits. *Davidson v. Root*, 98.
2. The commissioners of a county are, by law, required to furnish buildings, and everything necessary, for the public administration of justice. *Commissioners of Trumbull County v. Hutchins*, 368.
3. But they are not bound to furnish seals for the several courts. *Ib.*



County Seat—Creditor's Bill.

COUNTY—*Continued.*

4. Assumpsit may be maintained against the commissioners by the clerk, for the price paid by him for a press for the use of the seal. *Ib.*
5. The legislature may change the boundaries of a county; and, when such change places, an associate judge within the limits of another county, who does not, within a reasonable time, remove into the limits of the county for which he was appointed, forfeits his office. *Ohio v. Choate*, 511.
6. A person who attempts to exercise the office of associate judge in a county wherein he does not reside, is guilty of intrusion and usurpation. *Ib.*

COUNTY SEAT—

Whether courts of probate may be held at places other than the county seats. *Quere. Le Grange v. Ward et al.* 260.

COURTS—

1. The commissioners of the county are bound to furnish court rooms and clerks' offices, but not seals for the courts. *Commissioners of Trumbull County v. Hutchins*, 372.
2. The secretary of state is bound to furnish seals for the several courts. *Ib.*
3. The probate of a will, taken by the associate judges elsewhere in the county than the county seat, is held sufficient. *Le Grange v. Ward*, 257.
4. The jurisdiction of associate judges is confined to the limits of their county. *Ib.*
5. The court can not authorize a sale of a female minor's land after she attains twelve years of age, by a guardian appointed for her while under that age. *Perry v. Brainard*, 442.
6. Where, by special act, a person is authorized to file a bill, as in chancery, against the state, and the court is required to determine the cause upon the principles of justice and good faith, the court will examine and decide it in the same spirit of liberality that would be proper for the legislature to exercise, and without regard to technical principles. *Seely v. The State*, 501.

COVENANT—

The covenants in a deed which operate as estoppel are those running with the land. *Boyd's Lessee v. Longworth*, 235.

CREDITOR—

See CREDITOR'S BILL; CHANCERY.

CREDITOR'S BILL—

1. A general demand against a judgment debtor, to disclose his assets, is proper. *Miers & Coulson v. Zanesville & Maysville Turnpike Company*, 273.
2. No suit lies against the state, to compel the payment of subscription to stock. *Ib.*
3. A judgment creditor may pursue different interests of the debtor, and against different persons, in the same bill. *Cadwallader v. Granville Alexandrian Society*, 292.
4. A judgment creditor may demand from his debtor, in general terms, a disclosure of his assets. *Ib.*

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 Crimes—Deed.
 

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**CREDITOR'S BILL—Continued.**

5. Where a forfeiture or penalties may ensue from the answers to a bill, the defendant is not bound to answer. *Ib.* 298.
6. A creditor who first pursues the equities of a judgment debtor, by bill, is entitled to be first satisfied. *Loring v. Melendy*, 355.
7. The equity of creditors upon partnership property, for debts due them, is only the equity of the partners in the property, and can only be reached through the partners. *Wilcox & Welsh v. Kellogg and others*, 394.
8. Joint property will, in equity, be subjected to the payment of partnership debts. *Belknap v. Abbott & Cram*, 411.
9. Notes given by one member of a firm to his partners, on its dissolution, become their individual property, and, in possession of their assignees, can not be subjected to pay the creditors of the firm. *Ib.*

**CRIMES—**

1. The offense of bartering and selling counterfeit bank bills is distinct from that of passing counterfeit bank bills *as true and genuine*. *Vanvalkenburg v. The State*, 404.
2. An intent to kill may be an ingredient of the crime of manslaughter; but, under our statute, it is not a necessary ingredient. *Montgomery v. The State*, 424.
3. A person having possession in this state of property which he had stolen in another, may be convicted here of larceny. *Hamilton v. The State*, 435.

**DAMAGES—**

1. Where passengers injured by the upsetting of a coach have recovered against the proprietors, the damages assessed in such action can not be recovered by the coach proprietor from the road company for failing to keep the road in repair, which, in some degree, occasioned the accident. *Talmadge v. The Zanesville and Maysville Road Company*, 197.
2. But a recovery may be had for the injury done to the coach. *Ib.*
3. In an action of assumpsit against a commission merchant, who has sold the goods of his principal contrary to instructions, the value of the goods at the time of the sale is the rule of damages. *Woodward v. Suydam & Blydenburg*, 363.
4. In an action of trover by a landlord, against a constable, for seizing and selling a growing crop on an execution against the tenant, the landlord's proportional share of what was taken is the rule of damages. *Case v. Hart and Humphrey*, 364.
5. Anticipated profits or speculations in real property can not be recovered as damages for breach of a contract. *Seely v. The State*, 501.
6. Actual expenditures under the contract may be recovered. *Ib.*
7. Damages on protested bill. See **PROTEST DAMAGES**.

**DEED—**

1. A sheriff's deed takes effect from the day of sale, so as to pass whatever

## Deed.

**DEED**—*Continued.*

- interest the judgment debtor had in the lands sold at the time of the levy. *Boyd's Lessee v. Longworth*, 235.
2. The covenants in a deed which operate as estoppels are those running with the land. *Ib.*
  3. A deed of conveyance, made subsequent to a devise, does not revoke the will, unless it makes an entire disposition of the estate; but to any portion undisposed of by the deed, the will attaches, *pro tanto*, and carries it to the devisee. *Brush v. Brush*, 287.
  4. Where a deed calls for an object on the bank of a stream, thence south, thence east, thence north, to the bank of the stream, and with the course of the bank, to the place of beginning, the stream at low-water mark is the boundary. *Lamb v. Rickets*, 311.
  5. Where the owner of land is bounded by a stream, he owns to the center of the stream, subject to the easement of navigation; but to calculate the quantity in a survey, no reference is had to what lies between low-water mark and the center of the stream. *Ib.*
  6. A tax title is invalid when the land has been listed, forfeited, and sold as "one hundred and twenty acres in the Whitaker reserve," there being twelve hundred and eighty acres in that reserve. *Burchard v. Hubbard et al.* 316.
  7. Where a person, without title, conveys by deed of warranty, and afterward receives title as trustee from the rightful owner, for the purpose of transmitting it to a bona fide purchaser from the rightful owner, the doctrine of estoppel does not defeat the trust estate. *Ib.*
  8. A wife may transmit her separate estate through the intervention of a trustee to her husband. *Lewis and others v. Baldwin and others*, 352.
  9. A conveyance to A and B, and their heirs, and to the survivor of them, and to the heirs of such survivor, vests in the survivor an estate in fee. *Ib.*
  10. Where, prior to a judgment, a permanent leasehold estate had been conveyed by deed, absolute upon its face, though intended as a security, there only remained an equitable interest in the judgment debtor, to which no lien attached, and a judgment creditor, who first pursued the equity by bill, is entitled to be first satisfied. *Loring v. Melendy*, 355.
  11. A permanent leasehold estate is not a chattel; but is really subject to all the laws and rules which attach to land. *Ib.*
  12. A conveyance without warranty works no estoppel to the grantor who afterward acquires title. *Kinsman v. Loomis and Wood*, 475.
  13. A person defending his possession on no other grounds than that one of the grantors in the series of deeds had no title, is bound, by the recitals of the deed, to the same extent as if he were privy to the grantor. *Ib.*
  14. An acknowledgment taken in Connecticut, of a deed for land in Ohio, before an associate justice of the common pleas of the county where the land lies, is sufficient. *Ib.*
  15. Where a contract is for "a good title," a quitclaim deed is sufficient, if the vendor has title. *Pugh and Shultz v. Cheseldine*, 109.

## Devise—Electors and Elections.

## DEVISE—

A deed of conveyance, made subsequent to a devise, does not revoke the will, unless it makes an entire disposition of the estate; but to any portion undisposed of by the deed, the will attaches, *pro tanto*, and carries it to the devisee. *Brush v. Brush*, 287.

## DOWER—

1. A woman, under the ordinance of 1787, was dowable of all lands of which her husband was seized during coverture. *Betts v. Wise et al.*, 219.
2. Some right of dower has been found to exist in all nations of the Teutonic stock, from the earliest antiquity. *Ib.*
3. The partition of lands incumbered by a dower estate may be enforced in equity by the owner of the incumbrance, he being, also, tenant in common of the remainder. *Morgan v. Staley*, 389

## DRAFTS—

Book of drafts. *Kinsman v. Loomis and Wood*, 475.

## DYING DECLARATION

See EVIDENCE, 21.

## EJECTMENT—

1. Proceedings under the occupying claimant law have been considered as separate and distinct from the action of ejectment, although the judgment in the ejectment case can not be carried into execution until they are closed. *The Lessees of Patterson v. Prather*, 36.
2. And when the application is made by the defendant, and a judgment is given in his favor, the court will order the leasee of the plaintiff to pay costs. *Ib.*
3. A trustee under a deed of trust, with a power to sell for the payment of debts, may maintain ejectment, notwithstanding the debts have been discharged. *Moore v. Burnet*, 334.
4. A reconveyance from trustee to the *cestui que trust* is necessary to reinvest him with the legal title. *Ib.*

## ELECTION—

1. To create a case of election there must be a plurality of gifts or rights, with an intention, express or implied, of the party who has the right to control one or both, that one should be a substitute for the other. *Melick and Wife v. Darling*, 343.
2. The party who is to take has a choice, but he can not enjoy the benefits of both. *Ib.*

## ELECTORS AND ELECTIONS—

1. A person, the offspring of a white man and a half-breed Indian, is a lawful voter. *Jeffries v. Ankeny and others*, 372.
2. An action on the case lies against township trustees, for refusing a lawful vote, without proof of express malice. *Ib.*
3. Where the court of common pleas instructed the jury that a man who has any negro blood whatever, is not a lawful voter, it is error. *Thatcher v. Hawk and others*, 376.

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Equity—Evidence.

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**EQUITY—**

See CHANCERY.

**ERIE LAND COMPANY—**

Kinsman v. Loomis and Wood, 475.

**ERROR—**

If an erroneous charge to the jury be given on an abstract proposition, or on a point entirely out of any case made by the evidence, and the verdict can be supported by the proof made, the judgment will not be reversed. John Creed v. The Commercial Bank of Cincinnati, 489.

See PRACTICE.

**ESTATE—**

See DEED; HUSBAND AND WIFE.

**ESTOPPEL—**

1. Where a person, without title, conveys by deed of warranty, and afterward receives title as trustee, from the rightful owner, for the purpose of transmitting it to a *bona fide* purchaser from the rightful owner, the doctrine of estoppel does not apply to defeat the trust estate. Burghard v. Hubbard et al. 316.
2. A conveyance, without warranty, works no estoppel to the grantor who afterward acquires title. Kinsman v. Loomis and Wood, 475.
3. A person defending his possession on no other grounds than that one of the grantors, in the series of deeds, had no title, is bound by the recitals of the deed, to the same extent as if he were privy to the grantor. *Ib.*

**EVIDENCE—**

1. Individual notes, intended to pass as currency or money, are not competent evidence against the person issuing them, on an indictment for acting as an officer of a bank, without proving that there was a company or association of individuals formed for the purpose of putting in circulation such notes. Steedman v. The State, 83.
2. In an action on a policy of insurance, evidence will not be received to show that the loss was occasioned by negligence in the agents of the insured. Perrin's Adm'r's v. Protection Insurance Company, 147.
3. Newly discovered evidence furnishes no ground for a new trial, where such evidence is merely cumulative. *Ib.*
4. Where a recovery has been had against coach owners, for an injury to a passenger, the amount of such recovery can not be given in evidence in an action by the coach owners against a road company for not keeping the road in repair, by which, in some degree, the accident may have been occasioned. Talmadge v. The Zanesville and Maysville Road Company, 197.
5. The injury done to the property of the coach owners may be given in evidence. *Ib.*
6. Where a bond or sealed instrument is taken for a simple contract debt, the simple contract is merged, lost, and discharged in the bond. McNaughten v. Partridge et al. 232.

## Evidence.

**EVIDENCE—Continued.**

7. The presumption is, that such was intended by the parties where a security of a higher nature is received. *Ib.*
8. And that, too, whether it be the bond of the debtor, or of a third person. *Ib.*
9. The existence of a law in a sister state, or foreign jurisdiction, is matter of fact triable by a jury, and provable, if necessary, by witnesses. *Ingraham v. Hart*, 255.
10. The probate of a will, taken within the county, at another place than the county seat, by the associate judges, is competent evidence to establish the will. *Lessee of Le Grange v. Ward et al.* 257.
11. The statute, making certified copies of the files of the auditor of state evidence, authorizes their admission only where the originals would be competent. *The State v. Wells*, 261.
12. The act regulating the sale of school lands does not authorize the final certificate of the county auditor to be used as evidence to charge the county treasurer, nor is a certified copy of an account, made out by the auditor of state, from such certificates, competent evidence. *Ib.*
13. A parol contract for a lease, between landlord and tenant, in possession under a prior lease, is within the statute of frauds, unless possession be held solely under, and in performance of, the parol contract, the terms of holding clearly indicating the possession to be under the subsequent parol lease. *Armstrong v. Kattenhorn*, 265.
14. On an indictment, laying a particular day when the plaintiff acted as an officer of an unauthorized bank, it is competent for the prosecution to prove the act, after the day laid. *Brown v. The State*, 276.
15. When such office is exercised in this state, it is not necessary for the prosecution to prove that the bank or association is not incorporated. *Ib.*
16. All statutes are printed by authority; and, though local or special, are, nevertheless, public acts, of which courts of justice, *ex officio*, take notice. *Ib.*
17. It is otherwise with the acts or statutes of other states. *Ib.*
18. The value of goods sold by a commission merchant contrary to the instructions of his principal, may be recovered under the common count, for goods sold and delivered. *Woodward v. Suydam and Blydenburg*, 360.
19. When, on a trial for perjury, it becomes material to prove the contents of a book of accounts which the accused had admitted to be correct and true, the book may go to the jury as evidence of the extent and nature of the admission. *Halleck v. The State*, 400.
20. Proof of uttering and publishing counterfeit bank bills, as true and genuine, will not support an indictment under section 29 of the act for the punishment of crimes (*Swan's Stat.* 236), for bartering and selling counterfeit bank notes. *Vanvalkenburg v. The State*, 404.
21. A judgment entered without objection, in the name of the plaintiff, as commissioner of insolvents, is, between the parties, evidence that the plaintiff was such officer. *Job v. Collier*, 422.

## Evidence—Execution.

**EVIDENCE—Continued.**

22. It is error to admit evidence of dying declarations, without first finding that the deceased was conscious of his condition when making them. *Montgomery v. The State*, 424.
23. It is not error to allow a witness to state the substance of competent dying declarations, although he may not be able to give the precise words. *Ib.*
24. In proceedings against an attorney for malpractice, the evidence must be confined to the specifications. *Ohio v. Chapman*, 430.
25. A record in an action of slander, where an attorney was plaintiff, and where a plea, charging him with commission of a crime, has been found true, is not equivalent to a conviction for that offense. *Ib.*
26. A subscription to pay \$25, in labor or stock, for the construction of a road, will be construed as a contract with the person by whom the road is to be constructed, for work and labor. *Sperry v. Johnson*, 452.
27. The subscription paper may be given in evidence to support the common count for work and labor. *Ib.*
28. The "Book of Drafts" of the Connecticut Land Company is not evidence of a legal title, but only of an equity against the trustees of the company. *Kinsman v. Loomis et al.* 475.
29. That six per centum damages have been charged and received by a bank, on a protested bill, addressed, by mistake, to the acceptor in Ohio, instead of Philadelphia, is not evidence that the bank has reserved a greater amount of interest on its loans and discounts than six per centum per annum in advance. *The Commercial Bank v. John Reed*, 501.

**EXECUTION—**

1. Where, on a *ca. sa.*, the defendant turns out real estate to release his body, the judgment lien on other lands is not thereby discharged. *Douglass v. Paterson et al.* 42.
2. If a judgment debtor is arrested on a *ca. sa.*, such arrest will, in general, be considered equivalent to a satisfaction of the judgment. In fact, it is said to be the highest satisfaction known to the law. *Ib.*
3. But there are exceptions to this rule. As, if a judgment debtor, arrested, is discharged under insolvent laws, there can be no pretense that the judgment is satisfied. *Ib.*
4. If, at any subsequent period, the debtor shall accumulate property, the judgment can be enforced against his property, although it can not be enforced by a second arrest of his body. *Ib.*
5. Equity has no jurisdiction to compel a sheriff to pay over moneys collected on execution, because there is a plain, complete, and adequate remedy at law. *Ib.*
6. A general and standing order of the court of common pleas, directing the clerk to issue execution for costs, will authorize him, without any special order, to issue such execution. *Elliott v. Ellery*, 306.
7. An execution may be levied upon the interest of the mortgagor in possession of mortgaged lands. *Seymour v. King and others*, 342.

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 Executor and Administrator—Guardian and Ward.
 

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**EXECUTION—Continued.**

8. But as no fair sale can be made of land so situated, it affords a sound reason for abandoning such levy. *Ib.*
9. A sheriff's return that he could find no goods or chattels, lands or tenements, of the principal debtor, unincumbered by mortgage, is sufficient to authorize suit against the surety, on an injunction bond. *Ib.*
10. But since it is to be appraised at full price, without regard to the mortgage, which remains an incumbrance on the land, and which may be asserted against the purchaser, no fair sale can be made of lands so situated; and this affords a sound reason for abandoning such levy. *Ib.*
11. A judgment creditor may relinquish a levy where there is difficulty of making a fair sale, or a probability of not making the money, in consequence of earlier incumbrances. *Bank of Lake Erie v. Western Reserve Bank*, 444.

**EXECUTOR AND ADMINISTRATOR—**

Equity will relieve against a defective execution of a real contract by an executor or administrator. *Evants v. Strode's Adm'r*, 480.

**FORFEITURE—**

1. Where forfeitures or a penalty may ensue from the answers to a bill, the defendant is not bound to answer. *Cadwallader v. Granville Alexandrian Society et al.* 298.
2. Where a creditor's bill is framed in the alternative, charging that property is held under an illegal or void agreement, and praying that it may be set aside, or, if held valid, that the debtor's residuary interest may be subjected, the defendant may be protected in withholding disclosure as to part, while he would be bound to answer the remainder. *Ib.* 298.
3. Where, after a change in the limits of a county, an associate judge fails to remove within a reasonable time into the county for which he was elected, he forfeits his office. *Ohio v. Choate*, 511.

**FRAUD—**

See **CHANCERY**.

**FRAUDS, STATUTE OF—**

1. A parol contract, for a lease between landlord and tenant, in possession under a prior lease, is within the statute of frauds, unless possession be held solely under, and in performance of, the parol contract, the terms of holding clearly indicating the possession to be under the subsequent parol lease. *Armstrong v. Kattenhorn*, 265.
2. Where a parol contract, for the purchase or sale of lands, is admitted by a defendant in his answer, without relying upon the statute of frauds as a defense, performance will be decreed. *Woods v. Dille et al.* 455.

**GUARDIAN AND WARD—**

1. In this state, the guardianship of a minor female expires, by operation of law, when the ward arrives at the age of twelve years. *Perry v. Brainard*, 442.
2. A guardian, appointed for such minor when under twelve years of age, can not sell her land after she arrives at that age. *Ib.*



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Guaranty—Indictment.

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**GUARDIAN AND WARD—Continued.**

3. A sale under an order of court, made by such guardian, after the ward had arrived at the age of twelve years, is void. *Ib.*

**GUARANTY—**

1. The indorsement of a note, not negotiable, by a person not a party to it, is a guaranty. *Parker v. Riddle*, 102.
2. Upon such guaranty, demand of payment must be made when the note becomes due, and notice given by the indorser before suit. *Ib.* 102.

See **BILLS OF EXCHANGE.**

**HUSBAND AND WIFE—**

1. A wife may transmit her separate estate through the intervention of a trustee, to her husband. *Lewis v. Baldwin* and others, 352.
2. A conveyance to A. and B., and their heirs, and to the survivor of them, and to the heirs of such survivor, vests in the survivor an estate in fee. *Ib.*

**IMPRISONMENT—**

The act of March 19, 1838, abolishing imprisonment for debt, operates to discharge a recognizance of bail entered into before the act took effect. *Tousey v. Avery*, 90.

**IMPROVEMENTS—**

A valuation of improvements, under the occupying claimant law, is invalid, unless reasonable notice of making it be given to the adverse party, or his attorney of record. *Lessee of Patterson v. Prather*, 35.

**INCORPORATION, ACTS OF—**

See **CORPORATIONS.**

**INCUMBRANCE—**

See **MORTGAGE; LIEN.**

**INDIANS—**

See **VOTES AND VOTERS**, 2.

**INDICTMENT—**

1. The legislature have the power to declare what acts are criminal, and they have the same power to prescribe the forms of indictment for the commission of such criminal acts. *Lougee v. The State*, 71.
2. Where an offense consists in the performance of a specific act, it is necessary that it should be charged in the indictment to have been committed on a day certain. *Steedman v. The State*, 87.
3. Whether, having charged the offense upon one day, it will do to lay it with a *continuando*. *Quære*. *Ib.*
4. On an indictment, laying a particular day when the plaintiff acted as an officer of an unauthorized bank, it is competent for the prosecution to prove the act after the day laid. *Brown v. The State*, 276.
5. When such association exists in this state, it is not necessary for the prosecution to prove that the bank or association is not incorporated. *Ib.*
6. Form of an indictment for acting as an officer of an unauthorized bank. *Ib.*
7. The court have no power to order a prisoner to stand committed until fine and costs be paid. *Ib.* 281.

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 Infant—Insolvents' Commissioner.
 

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**INDICTMENT—Continued.**

8. But, after sentence, they may direct the detention of a prisoner until he can be charged in execution.
9. An indictment for resisting an officer must set forth all the facts necessary to constitute the offense. *Lamberton v. The State*, 282.
10. Every indictment should contain a complete description of the offense charged. *Ib.*
11. In an indictment for perjury, it is sufficient to aver that the court had power to administer the oath, without setting forth the facts necessary to give jurisdiction. *Halleck v. The State*, 400.
12. An indictment, for bartering, selling, and disposing of counterfeit bank notes, under section 29 of the statute for the punishment of crimes (Swan's Stat. 236), will not be supported by proof that the notes were passed as true and genuine. *Vanvalkenburg v. The State*, 404.

**INFANT—**

See **GUARDIAN AND WARD.**

**INFORMATION—**

1. An information in the nature of a *quo warranto* against a body or corporation exercising a franchise not conferred upon it by law, need not aver such institution to be a body corporate in law. *State of Ohio v. Granville Alexandrian Society*, 9.
2. The information must be filed in the county where the defendants have their office or place of business. *Ib.*
3. And it should appear that the violation of law complained of must have taken place in the county where the information is filed.

**INJUNCTION BOND—**

See **BOND.**

**INSOLVENT DEBTOR—**

1. If an insolvent debtor, arrested, be discharged under insolvent laws, there can be no pretense that the judgment is satisfied. *Douglas v. Patterson et al.* 44.
2. If, at any subsequent period, the debtor shall accumulate property, the judgment can be enforced against the property, although it can not be enforced by a subsequent arrest of the body. *Ib.*

See **INSOLVENTS' COMMISSIONER**, 2.

**INSOLVENTS' COMMISSIONER—**

1. A judgment entered without objection, in the name of the plaintiff, as commissioner of insolvents, is, between the parties, evidence that plaintiff was such officer. *Job v. Collier*, 422.
2. *Morris Seely*, an insolvent debtor, made an assignment of his effects, under the statute, to the commissioner of insolvents, for the benefit of his creditors. The legislature afterward authorized him to file a bill, as in chancery, against the state, to recover damages for an alleged breach of a contract between him and the canal commissioners, prior to his assignment. It was held that the commissioner of insolvents was not a necessary party to such suit, and the proceeds should go to *Seely*, and not to the commissioner. *Seely v. The State*, 401.

Insurance—Judgment.

**INSURANCE—**

1. In an action on a policy of insurance, it is no defense to show that the loss was occasioned by negligence in the agents of the insured. *Perin's Adm'r's v. Protection Insurance Company*, 147.
2. A loss of a steamboat by explosion of the boiler is covered by the policy. *Ib.*
3. The assured is bound to provide competent capacity and skill; it is a part of his implied warranty, which caution will enable him to perform. *Ib.*
4. But risks arising from the carelessness of his servants are covered by the policy. *Ib.*

**INSTRUCTIONS TO THE JURY—**

1. It is not error to instruct the jury that they are not absolute judges of the law in criminal cases. *Montgomery v. The State*, 424.
2. If an erroneous charge be given to the jury on an abstract proposition, or on a point entirely out of any case made by the evidence, and the verdict can be supported by the proof made, the judgment will not be reversed. *Creed v. Commercial Bank*, 489.

**INTEREST—**

1. Illegal interest paid can not be recovered back. *Sheldon v. Gill et al.* 417.
2. To enjoin a judgment at law on the ground that illegal interest is included therein, a tender must be made of the amount equitably due. *Ib.*
3. Banks are restricted by their charters from taking more interest than six per cent. per annum, in advance, on their loans and discounts. *Creed v. Commercial Bank of Cincinnati*, 489.
4. If more be taken, the note or bill on which it is taken is void. *Ib.*
5. It is not evidence that a greater rate of interest than six per cent. per annum, in advance, has been taken by a bank, where it has charged and received six per cent. damages on a protested bill, intended to be addressed to the acceptor at Philadelphia, but, by mistake, addressed to him in Ohio. *The Commercial Bank v. John Reed*, 498.

**INTRUSION—**

See **USURPATION.**

**JUDGES—**

See **ASSOCIATE JUDGE; ELECTIONS AND ELECTORS.**

**JUDGMENT—**

1. Where, on a *ca. sa.*, the defendant turns out real estate to release his body, the judgment lien on other lands is not thereby discharged. *Douglas v. Patterson*, 42.
2. If a judgment debtor is arrested on a *ca. sa.*, such arrest will, in general, be considered equivalent to a satisfaction of the judgment. In fact, it is said to be the highest satisfaction known to the law. *Ib.*
3. But there are exceptions to this rule; as if, for instance, a judgment debtor, arrested, is discharged under the insolvent law, there can be no pretense that the judgment is satisfied. *Ib.*
4. If, at any subsequent period, the debtor shall accumulate property, the judgment can be enforced against that property, although it can not be enforced by a second arrest of the body. *Ib.*

## Jurisdiction.

**JUDGMENT—Continued.**

5. The lien of a judgment or mortgage is not lost by the organization of a new county, which includes the incumbered land within its limits. *Davidson v. Root*, 98.
6. A sheriff's deed takes effect from the day of sale, so as to pass whatever interest the judgment debtor had in the lands sold, at the time of the levy. *Moore v. Burnet*, 334.
7. If a court have jurisdiction, its solemn acts and adjudications, although erroneous, are not void. They are valid until reversed. *Lessee of Le Grange v. Ward et al.* 261.
8. Where, prior to a judgment, a permanent leasehold estate had been conveyed by deed, absolute on its face, though intended as security, there only remained an equitable interest in the judgment debtor, to which no lien attached; and a judgment creditor, who first pursued the equity by bill, is entitled to be first satisfied. *Loring v. Melendy and others*, 355.
9. To enjoin a judgment at law, on the ground of illegal interest, the bill must show a tender of the amount equitably due. *Shelton v. Gill et al.* 417.
10. Where attorney's collecting fee is included in a judgment entered upon a warrant of attorney, the judgment may be set aside. *Ib.*
11. Money paid on a judgment can not be recovered back while the judgment remains in force. *Job v. Collier*, 422.
12. A judgment entered, without objection, in the name of the plaintiff, as commissioner of insolvents, is, between the parties, evidence that the plaintiff was such officer. *Ib.*
13. A judgment creditor may not unnecessarily, and without cause, relinquish a levy to the prejudice of purchasers; but embarrassments upon the title, difficulties in making a fair sale, or the probability of not making the money from it in consequence of earlier incumbrances, are sufficient causes. *Bank of Lake Erie v. Western Reserve Bank*, 444.
14. Lands lying under a judgment lien, which have been sold to purchasers, must be sold to satisfy the judgment, in the inverse order of the dates of the purchase. *Ib.*
15. The relation of principal and surety subsists after judgment. *Ib.*
16. A judgment will not be reversed, on the ground that an erroneous charge has been given, if the charge be upon an abstract proposition, or out of any case made by the evidence, and the verdict can be supported by the proof. *Creed v. Commercial Bank of Cincinnati*, 489.

**JURISDICTION—**

1. The probate of a will, taken within the county at another place than the county seat, by the associate judges, is competent evidence to establish the will. *Lessee of Le Grange v. Ward et al.* 257.
2. The solemn adjudications of courts, having jurisdiction over the subject matter, are not void, but are valid until reversed. *Ib.*
3. No suit lies against the state, to compel payment of subscription to stock. *Miers and Coulson v. Zanesville and Maysville Turnpike Company*, 273.

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 Jury—Landlord and Tenant.
 

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**JURISDICTION—Continued.**

4. Where a receiver of tolls has been appointed by a court of competent jurisdiction, that court acquires authority to determine all questions touching distribution and appropriation. *Ib.*
5. A person having possession, in this state, of property which he had stolen in another, may be convicted here of larceny. *Hamilton v. The State*, 435.
6. The court has no power to order a sale of a female minor's land, after she arrives at twelve years of age, upon the petition of a person appointed her guardian, while under that age. *Perry v. Brainard*, 442.
7. Such sale conveys no title. *Ib.*

**JURY—**

1. The right of a jury to judge of the law in a criminal case is not absolute, but is to be exercised under the direction of the court. *Montgomery v. The State*, 424.
2. After a jury have returned their verdict—have been discharged and separated—they can not be recalled to alter or amend it. *Sargent v. The State*, 472.
3. In criminal cases, the verdict should be received in presence of the prisoner, that he may have the jury polled. *Ib.*
4. The court may, and in some cases ought to, keep the jury together until their verdict is rendered, and should require the sheriff to furnish them with proper accommodations, and keep them in close custody. *Ib.*

**LAND—**

1. A sheriff's deed takes effect from the day of sale, so as to pass whatever interest the judgment debtor had in the lands sold, at the time of the levy. *Boyd's Lessee v. Longworth*, 235.
2. The covenants in a deed which operate as estoppels, are those running with the land. *Ib.*
3. A permanent leasehold estate is not a chattel, but is realty, subject to all the laws which attach to land. *Loring v. Melendy and others*, 355.
4. Where lands have been sold subject to judgment liens, the purchasers, as between themselves, may require them to be applied to the satisfaction of the judgments, in the inverse order of the dates of purchase. *Bank of Lake Erie v. Western Reserve Bank*, 444.
5. Where a parol contract, for the purchase or sale of land, is admitted by a defendant, in his answer, without relying on the statute of frauds, performance will be decreed. *Woods v. Dille et al.* 455.
6. Possession of land, obtained under a contract of purchase, does not become adverse to the vendor while the contract is acted upon and payment made. *Ib.*

**LANDLORD AND TENANT—**

1. A parol contract, for a lease between landlord and tenant, in possession under a prior lease, is within the statute of frauds, unless possession be held solely under, and in performance of, the parol contract, the terms of holding clearly indicating the possession to be under the subsequent parol lease. *Armstrong v. Kattenhorn et al.* 265.

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 Larceny—Lien.
 

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LANDLORD AND TENANT—*Continued.*

2. A landlord leasing to a cropper for one year, reserving as rent a part of the grain, has a lien upon the growing crop, and the entire crop can not be removed by the tenant, or those claiming under him, until the rent is provided for. *Case v. Hart and Humphrey*, 384.
3. Trover will lie for the landlord's share. *Ib.*

## LARCENY—

See CRIMES.

## LAWS, FOREIGN—

The existence of a law in a sister state, or foreign jurisdiction, is matter of fact, triable by a jury, and provable, if necessary, by witnesses. *Ingraham v. Hart*, 255.

See COMMERCIAL LAW; CONSTITUTIONAL LAW; STATUTES.

## LEASE—

See LANDLORD AND TENANT.

## LEASEHOLD—

A permanent leasehold estate is not a chattel, but is realty, subject to all the laws and rules which attach to land. *Loring v. Melendy*, 255.

## LEGISLATION—

1. The legislature may fill a prospective vacancy, that will happen before the meeting of the next general assembly. *Ohio v. McCollister*, 51; *Ohio v. Choate*, 511.
2. They may change the limits of a county; and where an associate judge fails to remove within the limits of the county for which he was elected, within a reasonable time, the legislature may proceed to fill the office by election. *Ohio v. Choate*, 511.
3. A law authorizing the appropriation of private property for public use, without providing compensation to the owner, is void. *Foot v. Cincinnati*, 408.

## LEGISLATIVE PRACTICE—

*Ohio v. Choate*, 511.

## LEVY—

See EXECUTION; LEASEHOLD ESTATE.

## LIEN—

1. Where, on a *ca. sa.*, the defendant turns out real estate to release his body, the lien of the judgment on other lands is not thereby discharged. *Douglas v. Wallace et al.* 42.
2. The lien of a judgment, or mortgage, is not lost by the organization of a new county, which includes the incumbered land within its limits. *Davidson v. Root*, 98.
3. Judgment liens do not exist at common law. Their creation, extent, and continuance depend entirely upon statutory provision. *Ib.*
4. That the lien may attach, the land must be in the county where the judgment is rendered, at the time of its rendition; or if in another county, there must be an actual levy. *Ib.*
5. Where mortgaged land falls into a new county, by its erection, a record

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Malpractice—Ministerial Fund.

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**LIEN—Continued.**

- of the mortgage, within the new limits, is not necessary to protect the mortgagees against subsequent purchasers, without notice. *Ib.*
6. A common carrier, receiving goods in the ordinary course of business, and in the proper line of transit, has a lien for the freight and charges paid, although the goods may have suffered damage before they reached him, while in the hands of some preceding carrier. *Bowman v. Hilton*, 303.
  7. To entitle a warehouseman to his lien for commission and advances, the law imposes upon him nothing beyond what a prudent man would, under like circumstances, have done in the management of his own business. *Ib.*
  8. Liens of this kind are favored in law. *Ib.*
  9. A judgment lien can attach only to legal estates. *Loring v. Melendy* and others, 355.
  10. Where a deed is made absolute upon its face, although intended only as security, the grantor has but an equity, upon which execution can not be levied, nor any judgment lien attach. *Ib.*
  11. A landlord, leasing to a cropper for one year, reserving, as rent, a part of the grain, has a lien upon the growing crop, and the entire crop can not be removed by the tenant, or those claiming under him, until the rent is provided for. *Case v. Hart and Humphrey*, 384.
  12. Trover will lie for the landlord's share, and his proportional share of what was taken is the rule of damages. *Ib.*
  13. Where lands, lying under judgment liens, have been sold to purchasers, they must go to satisfy the judgments in the inverse order of the dates of purchase. *Bank of Lake Erie v. Western Reserve Bank*, 444.

**MALPRACTICE—**

See ATTORNEY.

**MANDAMUS—**

Upon the return of a writ of mandamus, an issue must be made up, as in an action on the case for false return. *The State v. Trustees of Sections 29, 24.*

**MARRIED WOMAN—**

See HUSBAND AND WIFE.

**MERCHANT—**

A merchant, commencing business after the 1st day of March, is bound to report, for taxation, the whole amount of capital invested. The average value on hand, during the year, is not sufficient. *Treasurer of Perry v. Hood & Moeller*, 428.

See COMMISSION MERCHANT.

**MINISTERIAL FUND—**

1. Before any denomination of Christians can be entitled to any part of the ministerial fund, arising from the rents of section 29, they must have formed themselves into a society in the township in which the section is located, and have given themselves a name. *The State v. Trustees of Sections 29, 24.*
2. The agent, appointed to receive said fund, must have been appointed by

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 Minor—Mulattoes.
 

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**MINISTERIAL FUND—Continued.**

the society as a collective body, and not by the individual members of the society. *Ib.*

**MINOR—**

See **GUARDIAN AND WARD.**

**MISTAKE—**

1. A mistake, in law, may be corrected in equity. *Semble. McNaughten v. Partridge et al.* 223, 480.
2. But a party may, by his conduct after discovery of the mistake, waive and lose his right to have relief against such mistake. *Ib.* 235.
3. Where an instrument, by mistake of the parties as to the legal effect of the terms used, fails to carry out their intention, relief will be afforded in equity. *Evants v. Strode's Adm'rs*, 480.
4. A mistake will be corrected in equity. *Ib.*
5. A mistake, in a verdict, can not be corrected after the jury have been discharged. *Sargent v. The State*, 472.

**MORTGAGE—**

1. The lien of a judgment or mortgage is not lost by the organization of a new county, which includes the incumbered land within its limits. *Davidson v. Root*, 98.
2. Nor is a new record, within the newly organized county, necessary to protect the mortgage against subsequent purchasers without notice. *Ib.* 101.
3. The legal title of a trustee, under a deed of trust, with power to sell to pay debts, is not divested by a discharge of the debts; but the trustee may maintain ejectment. *Moore v. Burnet*, 334.
4. A mortgage is a mere incident to the debt, which it is intended to secure. *Ib.* 341.
5. A mortgage lives and dies with the debt. Satisfaction destroys it. *Ib.*
6. But, in an ordinary deed of trust, a reconveyance from trustee to *cestui que trust*, is necessary to reinvest him with the legal title. *Ib.*
7. An execution may be levied upon the interest of a mortgagor in possession of mortgaged lands. *Seymour v. King and others*, 342.
8. But it must be appraised at full price without regard to the mortgage. *Ib.*
9. The mortgage remains an incumbrance on the land, and may be asserted against the purchaser. *Ib.*
10. This affords a sound reason for abandoning such levy. *Ib.*
11. A court of equity is the proper tribunal to adjust the interests of all parties. *Ib.* 343.
12. Where, prior to a judgment, a permanent leasehold estate had been conveyed by deed absolute upon its face, though intended only as a security, there remained only an equitable interest in the judgment debtor, to which no judgment lien attached; and a creditor, who first pursued the equity by bill, is entitled to be first satisfied. *Loring v. Melendy and others*, 355.

**MULATTOES—**

See **BLACKS, NEGROES, AND MULATTOES.**



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Negligence—Office and Officer.

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**NEGLECT—**

1. In an action on a policy of insurance, it is no defense to show that the loss was occasioned by negligence in the agents of the insured. *Perrin's Adm'r's v. Protection Insurance Co.* 147.
2. Where an injury to a stage passenger may have been occasioned, in part, by the negligence of the coach owners and of the road company, and there has been a recovery of damages against the coach owners, such damages can not be recovered by them, in whole or in part, from the road company. *Talmadge v. Zanesville and Mayaville Road Co.* 197.
3. But the damage done to the stage, if the road be out of repair, may be recovered. *Ib.* 197.

**NEGROES—**

See **BLACKS, NEGROES, AND MULATTOS; VOTES AND VOTERS.**

**NEW TRIAL—**

A new trial will not be granted on the ground of newly discovered evidence, where such evidence is merely cumulative. *Perrin's Adm'r's v. Protection Insurance Co.* 147.

**NOTICE—**

1. As a general rule, parties to be affected by judicial proceedings should have notice. *Lessees of Patterson v. Prather*, 36.
2. A notice to depart the township, issued by but one of the two overseers of the poor, is void. *Trustees of Williamsburg v. Trustees of Jackson*, 37.
3. Notice must be given the indorsee of a note, not negotiable, before suit is brought. *Parker v. Riddle*, 102.
4. Where a patent recites assignments, by persons competent to convey, there is no presumptive notice to one, who derives title under such patent, of latent defects in the assignment. *Bell and wife v. Duncan et al.* 192.
5. It is otherwise, if the patent recites assignments by persons not competent to convey title. *Ib.* 192.

**OCCUPYING CLAIMANTS—**

1. A valuation of improvements, under the occupying claimant law, is invalid, unless reasonable notice of making it be given to the adverse party, or his attorney of record. *Lessee of Patterson v. Prather*, 36.
2. The judgment, in ejectment, can not be carried into execution until the proceedings, under the occupying claimant law, are closed, although these proceedings have been considered as separate and distinct from the action of ejectment. *Ib.*

**OFFICE AND OFFICER—**

1. Under the act of February 14, 1840, the same individual may hold, at the same time, the offices of associate judge and county treasurer. *The State v. McCollister*, 46.
2. The legislature have no power, by retrospective legislation, to deprive a man of an office. When a man becomes an incumbent of an office, he

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 Ohio University—Partners and Partnership.
 

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**OFFICE AND OFFICER—Continued.**

- has a vested right in that office, and all such rights are secured by the constitution. *Ib.*
3. An *incumbent* of an office is one who is legally authorized to discharge the duties of that office. A man, elected or appointed to an office, does not thereby become an "*incumbent*" of that office. *Ib.*
  4. The constitution of this state contemplates two different modes of conferring office. One is by *appointment*, the other by *election*. Whenever the office is conferred by the people, or by any considerable body of the people, it is spoken of as an *election*. Whenever it is conferred by an individual, as by the governor, or, by a select number of individuals, as by a judicial court, or, by the general assembly, it is spoken of as an *appointment*. *Ib.*
  5. An indictment for resisting an officer must set forth all the facts necessary to constitute the offense. *Lamberton v. The State*, 282.
  6. The county commissioners are bound to furnish court rooms and clerk's offices, and in a suitable manner. *Comm'rs of Trumbull v. Hutchins*, 372.
  7. The secretary of state is bound to provide seals for the several courts in the first instance, and, also, when broken, worn out, or unfit for use. *Ib.*
  8. The legislature may fill a vacancy that has happened, or is certain to happen before the meeting of the next general assembly. *Ohio v. Choate*, 511.
  9. An associate judge forfeits his office, by failing to remove into the county for which he was elected, after its limits have been changed. *Ib.*
  10. The legislature may appoint to fill his place. *Ib.*
  11. Intrusion and usurpation of office. *Ib.*
  12. Officer *de facto*. *Job v. Collier*, 422.

**OHIO UNIVERSITY—**

Under the act of 1804, establishing the Ohio university, and the act of 1805, amendatory thereto, the lands of the University, on lease, are subject to revaluation. *McVey et al. v. Ohio University*, 134.

**ORDER—**

See **TAX TITLE**.

**OVERSEERS OF THE POOR—**

See **PAUPER**.

**PARTITION—**

1. There can be no appeal to the Supreme Court from the judgment of the common pleas on a petition under the statute for partition. *Hoy v. Hites*, 254.
2. The partition of lands incumbered by a dower estate may be enforced in equity by the owner of the incumbrance, he being also tenant in common of the remainder. *Morgan v. Staley*, 389.

**PARTNERS AND PARTNERSHIP—**

1. One member of a firm can not bind his copartner by a bond under seal. *McNaughten v. Partridge et al.* 223.

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 Patent for Land—Paupers.
 

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**PARTNERS AND PARTNERSHIP—Continued.**

2. Where a bond is executed by one member of a firm, and all the members of the firm intending the instrument should bind them, the obligee has no remedy against the firm at law; but, on the ground of mistake, may charge them in equity. *Ib.*
3. A transfer by a firm to one partner, *bona fide*, and by him to a third person in like manner, for a valuable consideration, passes both the legal and equitable title to the property against the creditors of the firm. *Wilcox and Welsh v. Kellogg and others*, 394.
4. The equity of creditors upon partnership property for debts due them is only the equity of the partners in the property, and can only be reached through the partners. *Ib.*
5. Joint property will, in equity, be subjected to the payment of joint debts. *Belknap v. Abbott and Cram*, 411.
6. Notes given by one member of a firm to one of his partners, on its dissolution, become their individual property, and, in the possession of their assignee, can not be subjected to pay the creditors of the firm. *Ib.*

**PATENT FOR LAND—**

1. Where a patent for land recites assignments by persons competent to convey, there is no presumptive notice of latent defects to one who derives title under such patent. *Bell and wife v. Duncan et al.* 192.
2. It is otherwise, if the patent recites assignments by persons not competent to convey title. *Ib.*

**PATENT RIGHTS—**

1. The several patent rights to Samuel Booth, Horace J. Shumway, and Obadiah Parker, for the use of the article called American cement, are void. *Darst v. Brockway and others*, 462.
2. For what causes patent rights are held void.
3. Relief will be offered in equity against the payment of notes given for a void patent right. Money paid on such notes may be recovered back; and an injunction will be allowed against the collection of such notes as may be outstanding in the hands of the vendors of such void patent rights. *Ib.*
4. In sales of personal property, there is an implied warranty that the vendor has title to the property; and the same implication exists against the vendors of patent rights. *Ib.*

**PAUPERS—**

1. Where a new township is set off, all persons residing within its limits, and who have resided there long enough to obtain a legal settlement in the original township, have a legal settlement in the new township. *Trustees of Williamsburg v. Trustees of Jackson*, 37.
2. A notice to depart the township, signed by but one of two overseers of the poor, is void. *Ib.*
3. Where a pauper has become chargeable to a township in which he has not a legal settlement, the duty of removing him to the township where he was last legally settled, if his health will permit, is imperative; and,

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 Penalty—Possession.
 

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**PAUPERS—Continued.**

as a general rule, unless it is done, the township where he has a legal settlement can not be charged. *Ib.*

4. But in case of temporary relief removal is not necessary. *Ib.*

**PENALTY—**

SEE FORFEITURE.

**PERJURY—**

See INDICTMENT, 10.

**PLEAS AND PLEADING—**

1. Upon informations *quo warranto*. *The State v. Granville Alexandrian Society*, 1.
2. Upon return of a writ of mandamus, an issue must be made up, as in actions on the case for false return. *The State v. Trustees of Delhi*, 24.
3. Where a plea discloses a defense, under a statute of Pennsylvania, the modifications that statute received in Pennsylvania, either by construction or otherwise, not merely depending upon the just interpretation of the words of the statute, are facts to be disclosed by replication. *Ingraham v. Hart*, 255.
4. An indictment for resisting an officer must set forth all the facts necessary to constitute the offense. *Lamberton v. The State*, 282.
5. Every indictment should contain a complete description of the offense charged. *Ib.*
6. In a suit against principal and surety, a plea, by the surety, that the time was extended without his consent, is bad, not being an answer to the whole action. *Slipher v. Fisher et al.* 299.
7. The value of goods sold by a commission merchant, contrary to the instruction of his principal, may be recovered under the common count, for goods sold and delivered. *Woodward v. Suydam and Blydenburg*, 360.
8. In an indictment for perjury, it is sufficient to aver that the court had power to administer the oath, without setting forth the facts necessary to give jurisdiction. *Halleck v. The State*, 400.
9. In proceedings against an attorney for malpractice, the evidence will be confined to the specifications. *Ohio v. Chapman*, 430.
10. The amount of a subscription, for the construction of a road, may be recovered when the road is completed, upon the common count, for work and labor. *Sperry v. Johnson*, 452.

**POLICY—**

See INSURANCE.

**POOR—**

See PAUPERS.

**POSSESSION—**

1. Possession of land, obtained under a contract of purchase, does not become adverse while the contract is acted upon, and payment made. *Woods v. Dille et al.* 455.
2. Where a *custui que trust* is found in possession, for a long time, of land

Practice.

Possession—Continued.

which the trustee should have conveyed to him, a conveyance will be presumed. *Kinsman v. Loomis & Wood*, 475.

3. But this presumption springs only from possession, and will not aid him who attacks the possession of another. *Ib.*

PRACTICE—

1. Upon return of a writ of mandamus, an issue must be made up, as in an action on the case for false return. *The State v. Trustees of Sec. 29*, 24.
2. The proceedings under the occupying claimant law have been considered separate and distinct from the action of ejectment, although the judgment in the ejectment case can not be carried into execution until they are closed, *Lessee of Patterson v. Prather*, 36.
3. And, when the application is made by the defendant, and a judgment is given in his favor, the court will order the lessee of the plaintiff to pay costs. *Ib.*
4. An order that the defendant stand committed until fine and costs be paid, is erroneous. *Lougee v. The State*, 68; *Bonsal v. The State*, 72.
5. The judgment of the court of common pleas, in a criminal case, may be reversed, in part, and affirmed, in part. *Ib.*
6. The power to change the venue rests in the sound discretion of the court, and must depend upon the circumstances of each particular case. *Bank of Cleveland v. Ward et al.* 128.
7. The venue should not be changed on the affidavit of the party alone, but only upon clear and satisfactory proof, that fair and impartial justice, probably, can not be obtained in the county where the suit was commenced. *Ib.*
8. Where statutory damages are claimed on a protested bill, it is for the jury to find those damages, and not for the court to assess them, or add them to the verdict. *Crawford v. Wolcott*, 145.
9. Where a plea discloses a defense, under a statute of Pennsylvania, the modifications that statute has received in Pennsylvania are facts to be disclosed by replication. *Ingraham v. Hart*, 255.
10. The probate of a will, taken within the county, at another place than the county seat, by the associate judges, is competent evidence to establish the will. *Lessee of Le Grange v. Ward et al.* 257.
11. A general demand, in a bill in chancery, against a judgment debtor, to disclose his assets, is proper. *Miers and Coulson v. Zanesville and Mayaville Turnpike Co.* 273.
12. On an indictment, laying a particular day when the accused acted as an officer of an unauthorized bank, the act may be proved after the day laid. *Brown v. The State*, 276.
13. When such association exists in this state, it is not necessary to prove that it was not incorporated. *Ib.*
14. The court can not direct a prisoner to stand committed until fine and costs be paid; but, after sentence, they may direct his detention until he can be charged in execution. *Ib.*
15. A judgment creditor may pursue different interests of the debtor, and

## Practice.

**PRACTICE—Continued.**

- against different persons, in the same bill. *Cadwallader v. Granville Alexandrian Society*, 292.
16. Where a forfeiture of penalties may ensue, from the answers to a bill, the defendant is not bound to answer. *Ib.*
  17. Where forfeitures or a penalty may ensue from the answers to a bill, the defendant is not bound to answer. *Ib.*
  18. Where a bill is framed in the alternative, charging that property is held under an illegal and void agreement, and praying that it may be set aside; or, if held valid, that the debtor's residuary interest may be subjected, the defendant may be protected in withholding a disclosure as to part, while he would be bound to answer the remainder. *Ib.*
  19. In a suit against principal and surety, a plea, by the surety, that the time was extended without his consent, is bad, not being an answer to the whole action. *Slipher v. Fisher et al.* 299.
  20. Proceedings may be arrested at any stage of the case, when it is discovered that judgment would be arrested after verdict. *Ib.*
  21. A general and standing order of the court of common pleas, directing the clerk to issue execution for costs, will authorize him, without any special order, to issue such execution. *Elliott v. Ellery*, 306.
  22. The omission to make the certificate which judgment debtor is principal, and which is surety, can not be corrected by writ of error. *Kelly et al. v. Collins*, 310.
  23. It may be corrected in the court where the judgment was rendered. *Semble. Ib.* 311.
  24. If the certificate were refused in a proper case, and the facts appeared by bill of exceptions, error would lie. *Ib.*
  25. Where a judgment is entered up for collection fees, in addition to the principal debt and interest, the judgment may be set aside, on motion. *Shelton v. Gill et al.* 417.
  26. A defective appeal bond, if it contain the substance of a bond, will sustain an appeal, so far as to justify an order to file a new bond. *Saterlee et al. v. Stevens*, 420.
  27. The right of a jury to judge of the law, in a criminal case, is not absolute, but is to be exercised agreeably to section 6, article 8, of the constitution, under the direction of the court. *Montgomery v. The State*, 424.
  28. The substance of dying declarations is admissible, but it must appear that the deceased was conscious of his condition in making them. *Ib.*
  29. In proceedings against an attorney for malpractice, the evidence must be confined to, and establish the specifications. *Ohio v. Chapman*, 430.
  30. Where a person is appointed guardian for a female minor under twelve years of age, his guardianship expires upon her attaining that age. *Perry v. Brainard*, 442.
  31. After her arrival at that age, the court can not order the guardian to sell her land. *Ib.*
  32. If such order and sale be made, it is void. *Ib.*

Presumption—Principal and Surety.

PRACTICE—*Continued.*

33. An objection to the examination of a co-defendant in chancery, as a witness, without special order, comes too late at the final hearing, and after cross-examination. *Woods v. Dille et al.* 455.
34. After a jury have returned their verdict, and have been discharged, they can not be recalled, to alter or amend it. *Sargent v. The State*, 472.
35. In criminal cases, the verdict should be received in presence of the prisoner, that he may have the jury polled. *Ib.*
36. It may be received by a single judge. *Ib.*
37. The court may, and in some cases ought to, keep the jury together until their verdict is rendered. *Ib.*
38. Where the jury, by mistake, render a verdict only upon one or more of several counts in an indictment, it is competent for the prosecutor to enter a *nolle prosequi*, as to the counts on which the jury have not passed. *Ib.*

PRESUMPTION—

1. Arguments which assume the possibility that a co-ordinate branch of government will wantonly violate its plain duty, ought to be held of little weight in a court of justice. *Ohio v. Choate*, 511.
2. The presumption is that every public functionary will faithfully observe the obligations of duty and of his oath. *Ib.*
3. The official acts of legislative bodies are to be considered legal until the contrary appears. *Ib.*

See EVIDENCE, 7, 8; TRUST AND TRUSTEE, 5, 6; BANKS AND BANKING, 10.

PRINCIPAL AND AGENT—

1. Where a commission merchant sells flour consigned to him contrary to the instructions of his principal, he may be treated as a purchaser, and the value recovered, as for goods sold. *Woodward v. Suydam & Blydenburg*, 363.
2. The value at the time of sale is the rule of damages. *Ib.*
3. But if the commission merchant, from time to time, sends a bill of sales, to which no objection is made by the principal, and he draws for the balance of the account rendered, it is a ratification, and the principal can not recover for an alleged violation of his instructions. *Ib.*

PRINCIPAL AND SURETY—

1. The relation of principal and surety subsists after judgment. *Bank of Lake Erie v. Western Reserve Bank*, 444.
2. The surety may demand from the judgment creditor the pursuit of the debtor's unincumbered property. *Ib.*
3. If the creditor, unnecessarily and without cause, forego the means of satisfaction, he will not be permitted to claim it afterward from the surety. *Ib.*
4. A surety, by paying the debt, may substitute himself for the creditor, and take upon himself the administration of his remedies. *Ib.* 451.
5. But he has no right to interfere with the creditor's pursuit, unless he can

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 Priority—River.
 

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**PRINCIPAL AND SURETY—Continued.**

point out the property of the debtor upon which the burden will fall more equitably. *Ib.*

See **SURETY**, 2, 3, 4, 5, 6, 7.

**PRIORITY—**

See **CREDITOR AND CREDITOR'S BILL**.

Among judgment creditors and purchasers of land subject to judgment liens. *Kinsman v. Loomis and Wood*, 475.

**PROBATE—**

See **WILL**.

**PROMISSORY NOTES—**

See **BILLS OF EXCHANGE**.

**PROTEST DAMAGES—**

See **BILLS OF EXCHANGE**, 2, 20.

**PUBLIC RIGHT—**

The public right to a highway may be lost by non-user, but not by the encroachment of an adjacent owner for eighteen years. *Fox v. Hart*, 414.

**PUBLIC USE—**

Unless a law which authorizes private property to be taken for public use provides also for compensation to the owner, it is void. *Foot v. Cincinnati*, 408.

**PURCHASER—**

See **VENDORS AND PURCHASERS**.

**QUO WARRANTO—**

1. Pleadings in. *State of Ohio v. Granville Alexandrian Society*, 1.
2. The jurisdiction of the court upon *quo warranto* is confined to the county where the defendants have their office or place of business. *Ib.* 9.
3. And it should appear that the violation of law complained of must have taken place in the county where the information is filed. *Ib.*
4. Form of plea, under section 26 of the act relating to informations in the nature of *quo warranto*, and regulating the mode of proceeding therein. *Ib.* 18.

**RATIFICATION—**

See **CHANCERY**, 6; **COMMISSION MERCHANT**, 1; **VENDORS AND PURCHASERS**, 8.

**REAL CONTRACT—**

See **CONTRACT**, 4, 5, 6.

**RECITALS—**

See **PATENT FOR LAND**, 1, 2; **DEED**, 13.

**RELEASE—**

A deed of release, without warranty, operates only on existing rights, and works no estoppel to a grantor, who afterward acquires title. *Kinsman v. Loomis and Wood*, 475.

**RENT—**

See **LANDLORD AND TENANT**.

**RIVER—**

Land on the Ohio river, lying between high and low-water mark, is not



## Roads and Highways—Seal.

**RIVER—Continued.**

common to the public, but may be conveyed by the adjacent proprietor, whose land bounds on the rivet. *Blanchard's Lessee v. Collins and others*, 138.

**ROADS AND HIGHWAYS—**

1. Where passengers, injured by the upsetting of a coach, have recovered against the proprietors, the damages, assessed in such action, can not be recovered by the coach proprietors from the road company, for failing to keep the road in repair, which, in some degree, occasioned the accident. *Talmadge and Zanesville and Maysville Road Co.* 197.
2. But a recovery may be had for the injury done to the coach. *Ib.*
3. Where a receiver of tolls is appointed by a court of competent jurisdiction, that court has power to determine all questions of distribution and appropriation. *Miers and Coulson v. Zanesville and Maysville Turnpike Co.* 273.
4. An incorporated road company, which is authorized by its charter to lay out and construct a turnpike road, not exceeding one hundred feet in width, to erect gates and collect toll, has no right to appropriate, for a toll-house, land lying without the line of the road. *Kemper v. Cincinnati, Columbus and Wooster Turnpike Co.* 392.
5. The public right to a highway may be lost by non-user. *Fox v. Hart*, 414.
6. But where there has been a continued use of such highway, although its width has been encroached on by an adjacent owner for eighteen years, the right is not lost. *Ib.*
7. The supervisor may open such road its full width. *Ib.*
8. A subscription, for the construction of a road, will be considered as a contract to pay the person, by whom it shall be constructed, for work and labor. *Sperry v. Johnson*, 452.
9. And, when the road is completed, he may recover from the subscribers the amount of their subscription, on the common count, for work and labor. *Ib.*

**SALES—**

See **VENDORS AND PURCHASERS.**

**SCHOOLS AND SCHOOL LANDS—**

1. The act, regulating the sale of school lands, does not authorize the final certificate of the county auditor to be used as evidence to charge the county treasurer, nor is a certified copy of an account, made out by the auditor of state from such certificates, competent evidence. *The State v. Well's Adm'r*, etc. 261.
2. A school subscription, in aid of a common school fund, imposes no obligation to pay, if black children are admitted into the school, or those who are notoriously vicious, corrupt, immoral, or profane. *Chalmers v. Stewart*, 386.

**SEAL—**

It is the duty of the secretary of state to furnish seals for the several courts. *Comm'rs of Trumbull v. Hutchins*, 372.

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 Secretary of State—State.
 

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**SECRETARY OF STATE—**

The secretary of state is required, by law, to furnish seals for the several courts in this state, in new counties; and, also, where the seals have been lost, worn out, or are otherwise unfit for use. *Comm'rs of Trumbull v. Hutchins*, 372.

**SETTLEMENT—**

See **PAUPERS**; **OVERSEERS OF THE POOR**.

**SET-OFF—**

Where money is paid, by mistake, on a supposed legal obligation, when, in truth, no legal liability existed, if there was a moral obligation to make such payment, it can not be set off against a subsequent claim between the same parties. *Commercial Bank v. Reed* 488.

**SHERIFF—**

1. Equity has no jurisdiction to compel a sheriff to pay over moneys collected on execution. *Douglas v. Wallace*, 42.
2. A sheriff's deed takes effect from the day of sale, so as to pass whatever interest the judgment debtor had in the lands sold, at the time of the levy. *Boyd's Lessee v. Longworth*, 235.
3. A sheriff's return, that he could find no goods or chattels, lands or tenements of the principal debtor, unincumbered by mortgage, is sufficient to authorize suit against the surety, on an injunction bond. *Seymour v. King and others* 342.
4. The sheriff is an officer of the law; and a creditor need look to no other source of information than his official return. *Ib.*
5. If it be false, the sheriff may be sued for a false return. *Ib.*
6. Sureties, on an injunction bond, have also such an interest in the sheriff's return on an execution against principal, that it may be corrected, on motion, in the court where returnable. *Semble. Ib.*
7. An execution may be levied on the interest of the mortgagor, in the possession of mortgaged lands; but as no fair sale can be made of land so situated, it affords a sound reason for abandoning such levy. *Ib.*

**SPECIAL BAIL—**

See **BAIL**.

**SPECIFIC PERFORMANCE—**

1. Where a parol contract for the sale of land is admitted by the defendant in his answer, without relying upon the statute of frauds, performance will be decreed. *Woods et al. v. Dille et al.* 455.
2. Where an administrator undertakes, pursuant to the statute, to execute a real contract for the conveyance of land, and, by mistake, the terms employed do not carry the contract into effect, equity will relieve against the defective performance. *Evants v. Strode's Adm'r*, 480.

**STAGE-COACHES—**

See **COMMON CARRIERS**.

**STATE—**

No suit lies against the state to compel subscription to stock. *Miers and Coulson v. Zanesville and Maysville Turnpike Co.* 273.

Statutes Expounded—Surety.

STATUTES EXPOUNDED—

1. The title of an act does not constitute any part of an act; but it may be referred to, in order to explain what is doubtful in the act itself. *The State v. Granville Alexandrian Society*, 10.
2. Act for the abolishment of imprisonment for debt, effect of, upon pending proceedings. *Tousey v. Avery*, 90.
3. Under the statute for partition, there can be no appeal from the judgment of the common pleas. *Hoy v. Hites*, 254.
4. Act regulating taxation and collection of costs, *Swan's Stat.* 405. *Elliott v. Ellery*, 306.
5. The act of February 12, 1835, relating to fraudulent assessments, 33 Ohio Laws, 13. *Wilcox & Welch v. Kellogg and others*, 394.
6. The act providing for the collection of claims against steamboats, and other water-craft, *Swan's Stat.* 209. *Canal-boat Huron v. Simmons*, 458.
7. The act for the punishment of crimes, *Swan's Stat.*, secs. 22, 29. *Vanvalkenburg v. The State*, 404.
8. In respect to statutes authorizing the appropriation of private property to public use, it is held that a statute, authorizing the appropriation of private property to the public use, without providing compensation to the owner, is void. *Foote v. Cincinnati*, 408.

STATUTES, FOREIGN—

1. The existence of a law in a sister state, of foreign jurisdiction, is matter of fact triable by a jury, and provable, if necessary, by witnesses. *Ingraham v. Hart*, 255.
2. Where a plea discloses a defense under a foreign statute, the modifications that statute has received by construction, or otherwise, not depending upon the just interpretation of the words of the statute, are facts to be disclosed by replication. *Ib.*

STEAMBOAT—

See INSURANCE.

STREETS IN CINCINNATI—

*Foote v. Cincinnati*, 408.

STREAM—

See BOUNDARY.

SUBSTITUTION—

See PRINCIPAL AND SURETY, 4.

SUPERVISOR—

See ROADS AND HIGHWAYS.

SURETY—

1. The indorsers of an accommodation bill are not joint sureties, but are liable to each other in the order of their becoming parties. *Williams v. Bosson & Bros.* 62.
2. The omission to make the certificate, which judgment debtor is principal, and which is surety, can not be corrected by writ of error. *Kelly v. Collins*, 310.
3. The omission may be corrected in the court where the judgment was rendered. *Ib.* 311.

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Survey—Tolls.

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**SURETY—Continued.**

4. If it were refused in a proper case, and made appear by bill of exceptions, error would lie. *Ib.*
5. A sheriff's return, that he could find no goods or chattels, lands or tenements of the principal debtor, unincumbered by mortgage, is sufficient to authorize suit against the sureties, on an injunction bond. *Seymour v. King*, 342.
6. The sheriff's return is to be taken as true between the parties, for he is the officer of the law, and the creditor need look to no other source of information than his official return. *Ib.*
7. Perhaps the surety have such an interest in the return that they may correct it, on motion, in the court where it is returnable. *Ib.*
8. The surety may protect himself by paying the debt and claiming the benefit of the judgment by way of substitution. *Ib.* 343.

See PRINCIPAL AND SURETY, 1-3, 5.

**SURVEY—**

See BOUNDARY.

**SURVIVORSHIP—**

See HUSBAND AND WIFE.

**TAXES—**

1. When the profits of a bank are applied in payment of stock, the profits so applied are subject to the tax imposed by the act of March 12, 1831. *The State v. Farmers' Bank of Canton*, 94.
2. A merchant, commencing business after the 1st day of March, is bound to report, for taxation, the whole amount invested. The average value of stock, on hand during the year, is not sufficient. *Treasurer of Perry v. Hood and Moeller*, 428.

**TAX TITLE—**

When a sale for taxes is made on the 10th day of November, and the order of confirmation describes a sale made on the 10th, 11th, and 12th days of December, no title passes. *Northrop v. Devore*, 359.

See DEED, 6.

**TENDER—**

See CHANCERY, 34; INTEREST, 2.

**TENANTS IN COMMON—**

*Lewis et al. v. Baldwin et al.* 352.

**TIME—**

1. In a suit against principal and surety, a plea, by the surety, that the time was extended without his consent, is bad, not being an answer to the whole cause of action. *Slipher v. Fisher et al.* 299.
2. The public right to a highway may be lost by non-user for a great length of time. *Fox v. Hart*, 414.

**TOLLS—**

Where there is a receiver of tolls appointed under the statute by a court of competent jurisdiction, it acquires jurisdiction to determine all questions touching distribution and appropriation. *Miers and Coulson v. Zanesville and Maysville Turnpike Co.* 273.

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Toll-houses—Vacancy.

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**TOLL-HOUSES—**

An incorporated road company, which is authorized, by its charter, to lay out and construct a turnpike road, not exceeding one hundred feet in width, to erect gates and collect toll, has no right to appropriate, for a toll-house, land lying without the line of the road. *Kemper v. Cincinnati, Columbus and Wooster Turnpike Co.* 392.

**TOWNSHIP—**

See **MINISTERIAL FUND; PAUPER.**

**TOWNSHIP TRUSTEES—**

1. An action on the case lies against township trustees for refusing a lawful vote without proof of express malice. *Jeffries v. Ankeny and others*, 372.
2. But it is only in case of intentional injury that the jury will be likely to inflict a severe penalty. *Ib.* 374.

**TREASURER OF COUNTY—**

See **AUDITOR.**

**TROVER—**

See **LANDLORD AND TENANT.**

**TRUST AND TRUSTEE—**

1. The legal title of a trustee, under a deed of trust, with power to sell for the payment of debts, is not divested by the discharge of the debts, but the trustee may maintain ejectment. *Moore v. Burnet*, 334.
2. A conveyance by the trustee to the *cestui que trust* is necessary to reinvest him with the legal title. *Ib.*
3. But a mortgage is a mere incident to a debt which it is intended to secure. It lives and dies with the debt; satisfaction destroys it. *Ib.*
4. A wife may transmit her separate estate, through the intervention of a trustee, to her husband. *Lewis and others v. Baldwin and others*, 352.
5. Where a *cestui que trust* is for a long time in possession of land which the trustee ought to have conveyed to him, a conveyance will be presumed. *Kinsman v. Loomis et al.* 475.
6. But this presumption only springs from possession, and will not aid him who attacks the rights of one in possession. *Ib.*

**TRUSTEES OF TOWNSHIP—**

An action on the case lies against township trustees for refusing a lawful vote. *Jeffries v. Ankeny and others*, 372.

See **OVERSEERS OF POOR; TOWNSHIP.**

**USURPATION OF OFFICE—**

A person who attempts to exercise the office of associate judge, in a county wherein he does not reside, is guilty of intrusion and usurpation. *Ohio v. Choate*, 511.

**USURY—**

See **BANKS AND BANKING; INTEREST.**

**VACANCY—**

See **OFFICE**, 8-10.

## Vendors and Purchasers.

## VENDORS AND PURCHASERS—

1. In the sale of real estate by auction, a mistake, by the auctioneer, in entering the name of the owner of the real estate in the memorandum of sale, will be corrected in equity. *Pugh and Shultz v. Chesseldine*, 109.
2. If the purchaser has treated the contract as valid, although he might have abandoned it, he will be required to perform it. *Ib.*
3. When the contract is for a *good title*, a quitclaim deed is sufficient, if the grantor has the title. *Ib.*
4. The auctioneer is the agent for both parties, and the sale must be conducted in the utmost good faith. The bidder, as a general rule, has the right to rely on the printed conditions or verbal representations of the auctioneer; and, if they are not substantially true, it is a fraud upon the purchaser, and he is not bound by his bid. *Ib.*
5. Where a patent for land recites assignments by persons competent to convey, there is no presumptive notice, to one who derives title under such patent, of latent defects in the assignments. *Bell and wife v. Duncan et al.* 192.
6. The defense of *bona fide* purchaser is available to one deriving title under such patent. *Ib.*
7. It is otherwise, if the patent recites assignments by persons not competent to convey title. *Ib.*
8. Where a commission merchant, from time to time, sends an account of sales to his principal, who makes no objection to the sales, and draws for the balance of the account rendered, it is a ratification of the sales, and the principal can not recover for any alleged violation of his instructions, as to the terms of sale. *Woodward v. Suydam & Blydenburg*, 360.
9. Where lands, lying under judgment liens, have been sold to purchasers, they must go to satisfy the judgment, in the inverse order of the dates of purchase. *Bank of Lake Erie v. Western Reserve Bank*, 444.
10. Where joint debtors sell lands, subject to a judgment lien, they confer an equity upon the purchaser to exempt what he purchases from the burden, until all the other lands, subject to the lien, whether held jointly or severally, shall be exhausted. *Ib.*
11. Subsequent purchasers acquire the same equity, but subordinate to that of elder purchasers. *Ib.*
12. Where a parol contract, for the purchase or sale of lands, is admitted by a defendant in his answer, without relying on the statute of frauds, performance will be decreed. *Woods v. Dille et al.* 455.
13. What protection will be extended to a *bona fide* purchaser, without notice, is a question that does not arise, where neither party has the legal title. *Ib.*
14. In sales of personal property, there is an implied warranty, that the vendor has title to the property, and the law raises the same implication against the vendor of patent rights. *Darst v. Brockway et al.* 462.

Venue—Wills.

VENUE—

1. The power to change the venue rests in the sound discretion of the court, and must depend upon the circumstances of each particular case. *Bank of Cleveland v. Ward et al.* 128.
2. The venue should not be changed on the affidavit of the party alone, but only upon clear and satisfactory proof, that fair and impartial justice, probably, can not be obtained in the county where the suit was commenced. *Ib.*

VERDICT—

See JURY, 2, 3, 4.

VOTES AND VOTERS—

1. An action, on the case, lies against township trustees, for refusing a lawful vote, without proof of express malice; but it is only in case of intentional injury, that the jury will be likely to inflict a severe penalty. *Jeffries v. Ankeny and others*, 372.
2. A person, the offspring of a white man and a half-breed Indian woman, is a lawful voter. *Ib.*
4. Where the court instructed the jury that a man, who has any negro blood whatever, was not a lawful voter, it is error. *Thacker v. Hawk*, 376.
4. Where an amendment to the charter of Cincinnati, provided that the voters of the city, at the time and place of holding their annual election in April, should vote, by ballot, for or against said act becoming a part of the charter of the city, it was held that a vote, taken at the township polls, was not a proper compliance with the law, and that a vote of acceptance, there taken, was void. *Foote v. Cincinnati*, 408.

WARRANT OF ATTORNEY—

See ATTORNEY, 6.

WARRANTY—

See COVENANT, 1; ESTOPPEL, 1, 2, 3; CONTRACT, 5, 6.

WATER-COURSE—

See BOUNDARY, 1.

WATER-CRAFT—

See BOATS, 1, 2.

WAY—

See ROADS AND HIGHWAYS.

WIDOW—

See DOWER.

WILLS—

1. The probate of a will, taken within the county at another place than the county seat, by the associate judges, is competent evidence to establish the will. *Lessee of Le Grange v. Ward et al.* 257.
2. A deed of conveyance, made subsequent to a devise, does not revoke the will, unless it make an entire disposition of the estate; but, to any portion undisposed of by the deed, the will attaches, *pro tanto*, and carries it to the devisee. *Brush v. Brush*, 287.

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Witnesses—Work and Labor.

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**WILLS—Continued.**

3. To create a case of election, there must be a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both, that one should be a substitute for the other. *Melick v. Darling*, 343.
4. The party who is to take has a choice, but he can not enjoy the benefits of both. *Ib.*

**WITNESSES—**

Where a co-defendant in chancery has been examined as a witness, without special order, objection to his evidence comes too late at the final hearing, and after cross-examination. *Woods v. Dille et al.* 455.

**WORK AND LABOR—**

1. A subscription, for the construction of a road, will be considered as a contract to pay the person, by whom it shall be constructed, for work and labor. *Sperry v. Johnson*, 452.
2. And he may recover against the subscribers, on the common count, for work and labor. *Ib.*





